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LIMITS OF ENJOYMENT OF HUMAN RIGHTS IN THE SYSTEM OF THE EUROPEAN SOCIAL CHARTER

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Keywords: derogation, limitations, social rights, European Social Charter
Abstract: The article presents a detailed discussion of the derogation of commitments and the limitation of the use of human rights in the European Social Charter system. Some situations in which social rights can be subject to limitations have been discussed in specific examples. In addition, the article contains numerous references to jurisprudence along with the comments and comments of the author who takes up the polemic.

1. Preliminary remarks

Belief in the concept of the absolutely irrefutable nature of obligations undertaken by states in the area of international human rights, as much as the assumption of the full and integral enjoyment of human rights by individuals, would be something unreal, utopian even. The rule of the full enjoyment of human rights, which is associated with the presumption of such enjoyment and with their *pro homine* and *pro humanitate* interpretation, is subject to reason and is complemented with wise exceptions. With this regard the letter of human rights should be as precise as possible, if the system of human rights is to work properly. Defining the protected

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area in a precise manner, i.e. through introducing reasonable exceptions and limits, serves the protection of human rights well.[1]

Among all legislative mechanisms defining *ratione situationis* the scope of internationally protected human rights, those circumscribing the limits of reduction by States of their international obligations in the field of human rights in emergency situations (so called derogation) and limits of state interference in exercising human rights (so called limitation) are especially vivid.

The first of these mechanisms is not any kind of expiration, termination or revocation of international obligations undertaken by states[2], since the aforementioned obligations last invariable and inviolable with regard to the catalogue of rights that are not subject to derogation or do they fall under limitations with regard to their fulfilment, but under the condition of compliance with criteria of use of derogation measures – with regard to other rights, that may be repealed.[3]

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[1] See: T. Jasudowicz [in:] B. Gronowska. T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, 'Prawa człowieka i ich ochrona' [Human Rights and Their Protection], Toruń 2010, II edition, p. 227 and following (hereinafter referred to as: "Prawa człowieka…'). See also: R. Mizerski, *Test legalności w systemie Europejskiej Konwencji Praw Człowieka [Test of Rule of Law in the System of European Convention on Human Rights],* Warszawa 2009, p. 82 and following. Praise given to the African Charter on Human and Peoples' Rights are unsubstantiated, since the Charter lacks limitation clauses as well as a derogation clause – see: G. Egwuatu, *Afrykańska Karta Praw Człowieka i Ludów – ochrona bez klauzul limitacyjnych i derogacyjnej [The African Charter on Human and Peoples' Rights – Protection without Limitation and Derogation Clauses]* [in:] T. Jasudowicz (ed.), 'Prawa człowieka w sytuacjach nadzwyczajnych' [Human Rights in Emergency Situations], Toruń 1997, p. 101 and following. It is undisputed, however understandable in the situation of the Africa continent, a flaw of the said Charter.

[2] See i.e.: A. Wiśniewski, *Derogacja [Derogation],* [in:] M. Balcerzak, S. Sykuna (eds), 'Leksykon ochrony prawa człowieka. 100 podstawowych pojęć' [Lexicon on Human Rights Protection. 100 Basic Terms], Warszawa 2010, p. 42 and following; M. Lubiszewski, [in:] *Prawa człowieka…* op. cit., p. 246 and following; R. Mizerski, 'Prawa człowieka…' op. cit., p. 108 and following; T. Jasudowicz, *Determinanty międzynarodowo chronionej substancji praw człowieka w systemie uniwersalnym i europejskim (na tle nauczania Profesor Anny Michalskiej) [Determinants of Internationally Protected Human Rights in Universal and European Systems (with regard to the Teaching of Professor Anna Michalska)],* [in:] T. Jasudowicz and C. Mik (eds), 'Księga Pamiątkowa w hołdzie Profesor Annie Michalskiej' [Essays in Honour of Professor Anna Michalska], Toruń 1996, p. 94 and following.

[3] See Article 4(1) and (2) of the International Covenant on Civil and Political Rights; Article 15(1) and (2) of European Convention on Human Rights; and Article 27(1) and (2) of American Convention on Human Rights, texts in: M. Balcerzak, *Międzynarodowa*

The mechanism of the limitation of the enjoyment of human rights is created differently in treaties regarding first generation human rights (civil and political) and differently in treaties safeguarding second generation rights (economic, social and cultural). In the latter it is formed as a general limitation clause, that is one article regarding the admissibility of public authorities' interference in exercising human rights covered by the treaty.[4] In treaties covering first generation human rights the technique used is different due to the fact that interference of the public authorities in exercising the majority of these rights is intolerable, other rights are accompanied by limitation clauses, usually in the form of second section/paragraph of the article regarding the said rights.[5] Finally, in documents covering both first and second generation we can find general limitation clauses which may lead to confusion and misunderstanding, including the risk of using limitation to rights that should not be subject to such clauses in any circumstances.[6]

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ochrona praw człowieka. Wybór źródeł [International Protection of Human Rights. Selection of Sources], Toruń 2007, p. I-A/2/3; IV/1/7, respectively. In the Arab Charter on Human Rights one article includes both the mechanism of limitation of the enjoyment of human rights (Article 4(1)) and the mechanism of derogation of a State's obligations (Article 4(2)and (3)). Text in: A. Bieńczyk-Missala, *Międzynarodowa ochrona praw człowieka. Wybór dokumentów [International Protection of Human Rights. Selection of Documents]*, Warszawa 2008, p. 521 and following.

[4] See Article 4 of The International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as ICESCR), text in: *Międzynarodowa ochrona praw człowieka. Wybór dokumentów…* op. cit., p. 783 and following; Article 5 of to the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (hereinafter referred to as Additional Protocol to the ACHR), text in: *Międzynarodowa ochrona praw człowieka. Wybór źródeł…* op. cit., p. IV/2/2 and following.

[5] See Article 12(3), Article 18(3); Article 19(3); Article 21; and Article 22(2) of the International Covenant on Civil and Political Rights. See also: Article 8(2); Article 9(2); Article 10(2), Article 11(2) of European Convention on Human Rights and Article 2(3) of the IVth Protocol to the said Convention, text in: *Międzynarodowa ochrona praw człowieka. Wybór źródeł…* op. cit., p. II-A/1/1 and following; II-A/3/2 and following.

[6] See Article 29(2) of the Universal Declaration of Human Rights, text [in:] *Międzynarodowa ochrona praw człowieka. Wybór dokumentów…*, p. 21 and following. See also: Article 4(1) of the Arab Charter on Human Rights. With regard to the mechanism of limitation – see i.e.: T. Jasudowicz, *Determinanty…* op. cit., p. 92 and following; R. Mizerski, *Test legalności…* op. cit., p. 95 and following.; idem, in: *Prawa człowieka…* op. cit., p. 234 and following; A. Wiśniewski, *Klauzula limitacyjna [Limitation Clause]*, [in:] 'Leksykon…' op. cit., p. 189 and following; K. Wojtyczek, *Granice ingerencji ustawodawczej w sferze praw człowieka w Konstytucji RP [Limits of the legislative interference in the area of human rights in the Constitution of the Republic of Poland]*, Zakamycze 1999, p. 75 and following.

2. Derogation of obligations in the ESC system

In Article 30 of the European Social Charter (hereinafter referred to as ECS)[7] it is stated, that "In time of war or other public emergency threatening the life of the nation"[8] the contracting party may undertake the measures derogating from its obligations under the ECS, but only "to the extent strictly required by the exigencies of the situation"[9] and "provided that such measures are not inconsistent with its other obligations under international law"[10]. The second paragraph of this article states the obligation of the contracting party to keep the Secretary General of the Council of Europe fully informed, within a reasonable amount of time, "of the measures taken and of the reasons therefor."[11] The contracting party, which is using derogation measures, is also obliged to inform the said Secretary General "when such measures have ceased to operate and the provisions of the Charter which it has accepted are again fully executed".[12] The Secretary General, in accordance with the third paragraph of this article, is obliged to inform other Contracting Parties and the Director General of the International Labour Office of these circumstances.

2.1. Comparative remarks

As can be seen from the foregoing, the wording of Article 30(1) of the ESC and Article F of the RESC is in line with the wording of Article

[7] Text in: *Międzynarodowa ochrona prawe człowieka. Wybór źródeł*... op. cit., p. II-A/9/1 and following. See identically – Article F of the European Social Charter (revised) (hereinafter referred to as RESC), text in: *Międzynarodowa ochrona prawe człowieka. Wybór źródeł*... op. cit., p. II-A/12/1 and following. In the appendix to ESC it was explained, that this term "shall be so understood as to cover also the threat of war" – see *European Social Charter, Collected texts*, 3rd ed., Strasbourg 1997, p. 27. See also RESC, p. 74.

[8] French: "En cas de guerre ou en cas d'autre danger public menaçant la vie de la nation".

[9] French: "dans la stricte mesure où la situation l'exige".

[10] French: "à la condition que ces mesures ne soient pas en contradiction avec les autres obligations découlant du droit international".

[11] French: "des mesures prises et des motifs qui les ont inspirées".

[12] See Article 30 of the ESC in fine. French: "de la date à laquelle ces mesures ont cessé d'être en vigueur et à laquelle les dispositions de la Charte qu'elle a acceptées recoivent de nouveau pleine application".

15(1) of the ECHR. However, in other matters the systems of ESC and ECHR vary greatly. First and foremost, the ESC system lacks the equivalent of Article 15(2) of the ECHR, therefore it does not indicate any rights not subject to derogation, which means that potentially all obligations, with no regard to their nature, arising from the Charter may be subject to derogation. *Prima facie* such a conclusion is by all means proper. Besides, there is a difference in the obligation of notification imposed on the party using derogative measures, since the said party should inform the Secretary General "within a reasonable lapse of time"[13], whereas in Article 15(3) ECHR it is not highlighted. On the other hand, the Secretary General has a duty to inform not only other Contracting Parties, but also the Director General of the International Labour Office. This is a manifestation – and not an isolated one – of ties between the ESC system and the normative system of the International Labour Organization.[14]

2.2. Article 30 / Article F in practice

It is quite eloquent that the European Committee on Social Rights (hereinafter referred to as ECSR) until present has not found the possibility to address Article 30's interpretation and practical use. It applies both to reporting procedure, namely the conclusions of the Committee, created in the context of the examination and evaluation of the reports on carrying out the obligations given by Parties to the Charter, and to decisions of the Committee, taken as an effect of the examination and resolution of the collective complaints addressed to the ECSR.

If it is taken into consideration that in the universal system of the protection of human rights with regard to second generation rights there is no derogation clause and its place is taken by a general limitation clause[15], and furthermore – that rules on international humanitarian law, in principle, foresee continuing the validity and enforceability of second

[13] French: "dans un délai raisonnable".

[14] ESC refers to the ILO system in its Article 12(2), where the Parties are obliged "to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention (No. 102) Concerning Minimum Standards of Social Security". Furthermore, in accordance with Article 26 of ESC, "The International Labour Organisation shall be invited to nominate a representative to participate in a consultative capacity in the deliberations of the Committee of Experts".

[15] See Article 4 of the ICESCR; Article 5 of the Additional Protocol to the ACHR.

generation rights *durante bello*[16], then it should be – must be even – said that the mechanism of derogation does not add up to the area of human rights of the second generation, inside which the aforementioned general limitation clause seems to be sufficient.

Therefore Article 30 of the ESC (Article F of the RESC) is an expression of the zealousness of the authors of the Charter and so far in practice is a dead letter. Nevertheless, it is puzzling that the authors of the RESC did not let it go. The author is not ready to condemn the incorporation of the said article into the texts of both Charters, as long as it is associated with the *pro homine* and *pro humanitate* interpretation: since both Charters include a general limitation clause, such an article is reasonable provided that it is seen as increasing the scope and level of protection of the social rights above the level guaranteed by the said general clause, included in Article 31 of the ESC (Article G of the RESC).

3. Limits on exercising human rights in the ESC system

In Article 31(1) of the ESC (Article G of the RESC) it is stated that in principle "the rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II shall not be subject to any restrictions or limitations not specified in those parts" and these "restriction and limitations"[17] are permitted only exceptionally and only if they "are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals".[18] Such

[16] See i.e. Article 40(2), 49(3), 50, 51-52, 55-56 and 59 IV Geneva Convention relative to the Protection of Civilian Persons in Time of War. Text in: Polish OJ 1956, No. 38, item 271, annex. See also: rules no. 53-56, 131 and 138 *Listy zasad międzynarodowego prawa humanitarnego posiadających charakter norm zwyczajowych [List of Rules of International Humanitarian Law that are of Customary Character]*, [in:] J.-M. Henckaerts, 'Studium poświęcone zwyczajowemu międzynarodowemu prawy humanitarnemu(...)' [Study on Customary International Humanitarian Law (...)], translated into Polish by M. Sajkowski, Warszawa 2006, p. 30 and following.

[17] French: "ne pourront faire l'objet de restrictions ou limitations non spécifiées dans les parties I et II".

[18] French: "à l'exception de celles prescrites par la loi et qui sont nécessaires, dans une société démocratique, pour garantir le respect des droits et des libertés d'autrui ou pour protéger l'ordre public, la sécurité nationale, la santé publique ou les bonnes mœurs".

restrictions – in accordance with paragraph 2 – "shall not be applied for any purpose other than that for which they have been prescribed."[19]

3.1. Comparative remarks

As can be seen from the foregoing, striking differences between the text of the ESC/RESC and the limitation clauses included in Article 4 of the ICESCR or Article 5 of to the Additional Protocol to the ACHR can be seen. All of the above include the test of the rule of law, that is the test on the conformity of the restrictions in use with national laws; in other words that their application is based on national regulations that allow such restrictions, and is consistent with these regulations. Considering the universal system and the inter-American system modelled on it, it can be observed that it states also a purpose ("for the purpose of preserving the general welfare in a democratic society") and the extent of the restrictions ("only to the extent that they are not incompatible with the purpose and reason underlying those rights"), whereas the ESC/RESC system in the matters of the suitability and necessity tests is modelled on limitation clauses from the ECHR, which highlight the catalogue of legitimate aims ("the protection of the rights and freedoms of others" or "interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals") and the test of "necessity in a democratic society".

Even if one was to accept – and it seems that one should – that in the system of ICESCR and ACHR the limitation of the enjoyment of human rights is based on three tests: of the rule of law, of suitability and of necessity, one should demonstrate that the test of suitability in the system of the Covenant and the system of the American Convention is too vague because what really does "preserving the general welfare in a democratic society" mean in comparison with the catalogue of the five basic values, for the protection of which the State may interfere in exercising social rights in ESC system, where personal, human values are emphasized ("protection of the rights and freedoms of others") and accompanied with state ("national security", "public interest") and social values ("public health", "morals").

[19] French: "ne peuvent être appliquées que dans le but pour lequel elles ont été prévues".

Considering the variety of the catalogues of basic values in Articles 8-11 of the ECHR and in Article 2 of its IV Additional protocol, and at the same time considering the recurrence of certain collections of aims, which can be described as "hard core" of the test of suitability [20], it can be said that the catalogue of aims foreseen in the ESC/RESC systems is more less the same as the one in the ECHR system. However, some things may be puzzling – like why "protection of morals" was replaced with "protection of decency"[21] or "health" with "public health" or why the term – present in all limitation clauses in the ECHR – "public safety" and – present only in Article 8(2) of the ECHR – term "economic well-being of the country" were omitted. The ECSR never addressed the issues connected with the need, meaning and significance of these changes.

3.2. Article 31 of the ESC/article G of the RESC in the assessment of the ECSR

Puzzling and odd is the fact that the ECSR in its Conclusions created in the context of the examination and evaluation of reports given by the Parties to the Charter focused neither on the issue of the interpretation of Article 31 of the ESC / Article G of the RESC nor on its meaning for the functioning of the Charter. In its general remarks on carrying out the obligations arising from point 18 of part I of the Charter, the Committee, admittedly, highlighted the fact that the rule on the right of citizens of contracting states to engage in any gainful occupation on the territory of other contracting states on an equal

[20] More on the topic: T. Jasudowicz, *Test celowości w funkcjonowaniu mechanizmu limitacji korzystania z praw człowieka w systemie EKPC [Test of Suitability in the Functioning of the Mechanism of Limitation of Enjoyment of Human Rights in the ECHR System]*, 'Polski Rocznik Praw Człowieka i Prawa Humanitarnego' 2012, vol. III, p. 35 and following. See: R.Mizerski, *Test legalności...* op. cit., pp. 97-98; idem, *"Test celowości" [Test of Suitability]*, [in:] 'Prawa człowieka...' op. cit., p. 241 and following; K. Wojtyczek, op. cit., p. 179 and following; L. Garlicki, *Article 8 (Prawo do poszanowania życia prywatnego i rodzinnego) [Article 8 (Right to Respect for Private and Family Life]*, [in:] L. Garlicki (ed.), 'Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, t. I: Komentarz do artykułów 1-18' [Convention for the Protection of Human Rights and Fundamental Freedoms, vol. I, Commentary on Article 1-18] Warszawa 2010, p. 479 and following, p. 488.

[21] It seems that the problem arises in the Polish translation because in the English official text the term "morals" is used, whereas the French original text uses "bonnes mœurs".

footing with nationals of the latter does not preclude restrictions based on cogent economic or social reasons, which States are obliged to explain in their reports.[22] In doing so the Committee did not evoke Article 31 of the ESC.

The Governmental Committee in the 5th supervisor cycle highlighted the meaning of Article 31 of the Charter:

> The Committee states the view, that these restrictions "based on cogent economic or social reasons" are not the only ones applicable to Article 18; this article – like all articles in Part II – falls within the scope of Article 31, which justifies all restrictions necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.[23]

ECSR was more clear in its attitude towards Article 31 in its decisions resolving the collective complaints addressed to the Committee. In the case *SAGES v. France* the complainant trade union alleged that "the national regulations are in breach of Articles E and G, read in conjunction with Article 5" of the Charter.[24] The Committee in fact stated, that "Article G provides for the conditions under which restrictions on the enjoyment of rights provided for by the Charter are permitted". It is important it added that "This provision corresponds to the second paragraph of Articles 8 to 11 of the European Convention on Human Rights. It cannot lead to a violation as such"[25], however, this provision "must be taken into consideration when examining the conformity of national situations with any substantive provision of the Charter".[26] Similarly, in the *IKA-ETAM v. Greece* case the Committee confirmed that Article 31 "as such" cannot be directly invoked "but only provides a reference for the interpretation of the substantive rights provisions of the Charter, which are at stake in a given complaint"[27].

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[22] See Conseil de l'Europe. Comite d'Experts Independants de la Charte Sociale Europeenne, *Conclusions II*, Strasbourg 1971, p. 60; *Recueil de Jurisprudence relative a la Charte Sociale Europeenne*, Strasbourg 1982, p. 141.

[23] Rapp Gouv., 5e cycle, CGH/Ch. Soc.(78)11, pp. 15-16, after: Recueil… op. cit., p. 146.

[24] SAGES v. France, complaint no. 26/2004, Decision on the merits adopted on 15.6.2005, para. 6. See also para. 28.

[25] SAGES v. France, supra, para. 31.

[26] SAGES v. France, supra, para. 33.

[27] IKA-ETAM v. Greece, complaint no. 76/2012, Decision on the merits adopted on 7.12.2012, para. 48. See identical: POPS v. Greece, complaint no. 77/2912, Decision on the merits adopted on 7.12.2012, para. 44; I.S.A.P. v. Greece, complaint no. 78/2012,

Thus, Article 31 of the ESC and identical Article G of the RESC is a general clause, without the character of autonomic power/obligation, nevertheless very important because serving all social rights guaranteed by the Charter and in connection with each of these rights defining *ad casum* the scope of obligations on a given State in a given situation. The Committee stressed that:

> any restriction has to be (i) prescribed by law, (ii) pursue a legitimate purpose, i.e. the protection of the rights and freedoms of others, of public interest, national security, public health or morals and (iii) necessary in a democratic society for the pursuance of these purposes, i.e. the restriction has to be proportionate to the legitimate aim pursued[28].

Interpretation of Article 31 of the ESC and Article G of the RESC was in fact based on pointing out three tests: of the rule of law, of suitability and of necessity, in a way which is equivalent to the line of reasoning presented by the European Court of Human Rights in the ECHR system; other parts were, however, stressed: the Committee mainly focused on the test of the rule of law and very little attention was given to the test of necessity.

Due to the fact that conducting these test was strongly influenced by the specificity of the right protected in the Charter and the specific features of the situation, connected with exercising the right in question, I will address this problem in a subsequent part of this paper, concerning limitation in the context of specific rights protected by the Charter.

3.3. Meaning of the limitation on exercising human rights in the context of selected rights in the ESC/RESC system

As far as the right to work, stated in Article 1 of the ESC, is concerned – especially Article 1(2) in the context of forced or compulsory labour,

Decision on the merits adopted on 7.12.2012, para. 44; POS-DEI v. Greece, complaint no. 79/2012, Decision on the merits adopted on 7.12.2012, para. 44; ATE v. Greece, complaint no. 80/2012, Decision on the merits adopted on 7.12.2012, para. 44.

[28] CITUB, CL"P" and ETUC v. Bulgaria, complaint no. 32/2005, Decision on the merits adopted on 16.10.2006, para. 24 in fine. See similar: ETUC, CGSLB, CSC/FGTB v. Belgium, complaint no. 59/2009, Decision on the merits adopted on 13.9.2011, para. 40; IKA-ETAM v. Greece, supra, para. 70.

the Committee analysed cases, in which public service officials were detained due to their refusal to, for lack of or delay in carrying out their duties, where such sanctions "were of general nature and were not limited to the cases, in which such refusal, lack or delay were posing a threat to security or public interest".[29] The Committee in so doing explained that "Due to the general character of these conditions, which have no justification in Article 31 of the Charter, the Committee feels obliged to reach a conclusion, that they are contrary to rule, that forced labour is prohibited under Article 1(2)".[30]

In the *CGT v. France* case, the Committee analysed the introduction of "Solidarity Day" involving "an additional day's work" and "additional hours of work paid at a normal rate", which seemed contrary to Article 4(2) of the Charter.[31] It has, however, considered that "this restriction on Article 4(2) is provided by law, pursues the legitimate aim of protection of public health in respect of a vulnerable section of the population, and is proportionate to the legitimate aim pursued."[32] Apparently the Committee followed the logic behind the mechanism of the limitation of exercising human rights, stated in Article 31 of the Charter, and took into account all three tests, but did not point to this article directly.

The remarks of the Committee, expressed in a decision given in the *CITUB, CL"P" and ETUC v. Bulgaria* case, on the Bulgarian general legal ban of the right to strike are very informative on the scope necessary in accordance with the Charter for the right to strike, stated in its Article 6(4). They are: 1) for workers employed in healthcare, communications and energy production, distribution and supply sectors; 2) for railway workers; 3) for civil servants.[33]

With regard to the first of these areas, the Committee found the prohibition of strikes to be "prescribed by Bulgarian statutory law"

[29] Such cases concerned mainly Italy – see Conclusions IV, Strasbourg 1975, p. 8. A similar conclusion was reached in connection with sanctions on board a vessel of aircraft in cases, where "on board were no threats to life or human health or safety of vessel or aircraft" – ibidem. See also: Recueil..., p. 4. See – without *expressis verbis* indication to Article 31 – Conclusions III, Strasbourg 1973, p. 5/6.

[30] Ibidem, p. 8 and 4, respectively.

[31] CGT v. France, complaint no. 55/2009, Decision on the merits adopted on 23.6.2010, paras 87-88.

[32] CGT v. France, supra, para. 89.

[33] CITUB, CL"P" and ETUC v. Bulgaria, supra, paras 17-28, 34-38 and 44-47, respectively.

and that it "may (...) serve a legitimate purpose in the meaning of Article G" due to the fact that "the provision of electricity, communications and healthcare may be of primary importance for the protection of the rights of others, public interest, national security or public health"[34], therefore the requirements of the test of rule of law and of suitability have been met. However "there is no reasonable relationship of proportionality between a general ban on the right to strike, even in essential sectors, and the legitimate aims pursued", hence such a restriction "cannot be regarded as being necessary in a democratic society within the meaning of Article G"[35].

With regard to the ban on the right to strike for railway workers, the Committee did not establish that the ban "pursues a legitimate purpose in the meaning of Article G", the lack of which "such restriction may consequently not be considered as being necessary in a democratic society within the meaning of Article G"[36].

As to the general ban on the right to strike for civil servants, the Committee had some doubts with regard to the test of the rule of law and of its suitability; however it was found that undoubtedly "there is no reasonable relationship of proportionality between prohibiting all civil servants from exercising the right to strike, irrespective of their duties and function, and the legitimate aims pursued", therefore "Such restriction can (...) not be considered as being necessary in a democratic society in the meaning of Article G"[37].

The ECSR approached very broadly to the test of rule of law in the *ETUC, CGSLB, CSC/FGTB v. Belgium*, where it examined the issue fundamental to the said case, which was, "whether the right to collective

[34] CITUB, CL"P" and ETUC v. Bulgaria, supra, paras 25-26 respectively.

[35] CITUB, CL"P" and ETUC v. Bulgaria, supra, para. 27.

[36] CITUB, CL"P" and ETUC v. Bulgaria, supra, paras 36-38. Also, with regard to the test of rule of law, the ECSR found, that "the law does not satisfy the requirements of precision and foreseeability implied by the concept of 'prescribed by law' within the meaning of Article G" – CITUB, CL"P" and ETUC v. Bulgaria, supra, para. 35.

[37] CITUB, CL"P" and ETUC v. Bulgaria, supra, para. 46. Earlier the Committee recalled its Statement of Interpretation from the 1st supervisory cycle, in accordance with which restrictions to the right to strike of certain categories of civil servants may serve a legitimate purpose in the meaning of Article G, namely "those whose duties and functions, given their nature or level of responsibility are directly affecting the rights of others, national security or public interest" – see CITUB, CL"P" and ETUC v. Bulgaria, supra, para. 45; see also: *Interpretative statement*, [in:] Conclusions I, pp. 38-39.

action is recognised by Belgian law, whether there do exist any restrictions to the enjoyment of the right secured under Article 6(4) of the Revised Charter, and if so, whether these restrictions fulfil the conditions set out in Article G of the Revised Charter"[38].

Due to the fact that Belgian law did not formally establish a right to strike, which in the view of the Committee, "does not in itself constitute a violation of the Charter", the ECRS decided to examine whether "such a right is guaranteed in law and in fact through an established and undisputed case law of the domestic highest courts",[39] at the same time bearing in mind, that "when the task of implementing the State's obligations resulting from the Charter, in the absence of statutory law, rests on the case law of domestic courts, the latter need be reasonably precise and exclude contradictions."[40]

Doubts had arisen especially in connection with the right to peaceful picketing activities, which were found to be "legally based on different articles of the Constitution and not included in the judge-made 'right to strike'" and in the view of the Committee did not appear "in itself incompatible with the Charter, as long as the same level of protection is effectively guaranteed to all aspects included within the scope of Article 6(4)."[41] Nonetheless, "where picketing activity does not violate the right of other workers to choose whether or not to take part in strike action, the restriction of such activity will amount to a restriction on the right to strike itself, as it is legitimate for striking workers to attempt to involve all

[38] ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 24.

[39] ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 27. According to the ECRS "the fact that the Belgian Court of Cassation does not explicitly refer to Article 6(4) of the Revised Charter when establishing the right to strike, does not amount to a violation of the Revised Charter." – ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 28.

[40] ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 28 in fine. This was complemented in para. 43 by interpretative statement: "In providing that restrictions on the enjoyment of Charter rights must be 'prescribed by law', Article G does not require that such restrictions must necessarily be imposed solely through provisions of statutory law. The case-law of domestic courts may also comply with this requirement provided that it is sufficiently stable and foreseeable to provide sufficient legal certainty for the parties concerned".

[41] ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 30. The Committee acknowledged the conflicting case law (para. 33).

their fellow workers in their action."[42] The ECRS reached the conclusion, that "the obstacles to the functioning of strike pickets posed by the operation in practice of the 'unilateral application procedure' under Belgian law should be understood as constituting a restriction on the exercise of the right to strike as laid down in Article 6(4) of the Charter."[43]

The Committee highlighted that "the expression 'prescribed by law' includes within its scope the requirement that fair procedures exist" and it pointed out that the complete exclusion of unions from the "unilateral application" procedure "poses the risk that their legitimate interests are not taken into consideration" and it will not be remedied by the subsequent right to appeal to court, which is time-consuming and gives no guarantee of effective protection.[44] Therefore, in the view of the ECRS "the exclusion of unions from the emergency relief procedure may lead to a situation where the intervention by the courts runs the risk of producing unfair or arbitrary results" ergo "such restrictions to the right to strike cannot be considered as being prescribed by law."[45]

Sole lack of fulfilment of the test of the rule of law would be enough to identify the breach of the Charter. The Committee in this case, however, also used the test of suitability in connection with the test of necessity, stating that "any restriction on the right to strike may not go beyond what is necessary to pursue one of the aims set out in Article G"[46] taking into account all of these tests, the ECSR reached a conclusion that "Belgian law does not provide guarantees for employees participating in a lawful strike within the meaning of Article 6(4) of the Revised Charter."[47]

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[42] ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 36. However, the Committee has no jurisdiction to decide on the legal classification of these facts, it is for the national courts since they do hold such jurisdiction, and the Committee "bases its arguments on the classification which these authorities adopt." – ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 37.

[43] ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 39.

[44] ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 44.

[45] ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 44 in fine.

[46] ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 45. The Committee stated, that the procedure applied "may intend to pursue the aim of protecting the right of co-workers and/or of undertakings", which did not apply to the procedure in place, since it "in its practical operation goes beyond what is necessary to protect those rights by reason of the potential lack of procedural fairness." – ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 45 in fine.

[47] ETUC, CGSLB, CSC/FGTB v. Belgium, supra, para. 46. As a *Conclusion* the Committee stated, that "the restrictions on the right to strike constitute a violation of Article 6(4)

Other interesting opinions on the realisation of the rights stated in Article 6 of the Charter appear in *STUC(LO) and SCPE(TCO) v. Sweden*, and this is due to the fact that they concern the right to collective bargaining, the right to strike in the context of the functioning of foreign companies and the law of the European Union.[48] Foreign companies often did not have the competence to participate in collective bargaining, which forced the Swedish trade unions to establish and maintain contact with workers abroad.[49] It was not contrary to EU law and ECJ jurisprudence. The ECSR sternly reiterated that "(…)when Member States of the European Union agree on binding measures in the form of directives which relate to matters within the remit of the European Social Charter, they should – both when preparing the text in question and when transposing it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter."[50] In the view of the Committee "(…)the same principle is applicable – mutatis mutandis – to national provisions based on preliminary rulings given by the CJEU on the basis of Article 267 of the Treaty on the functioning of the European Union, as that given with respect to the Laval case (…)".[51]

The ECRS pointed out that "the exercise of the right to bargain collectively and the right to collective action, guaranteed by Article 6(2) and (4) of the Charter, represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter", such as for example those relating to just conditions of work (Article 2), safe and healthy working conditions (Article 3), fair remuneration (Article 4), information

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of the Revised Charter, on the ground that they do not fall within the scope of Article G as they are neither prescribed by law nor in keeping with what is necessary to pursue one of the aims set out in Article G".

[48] More on the relations of the ECSR towards EU law – see T. Jasudowicz, *Europejski Komitet Praw Socjalnych wobec porządku prawnego Unii Europejskiej [The European Committee on Social Rights and the Legal System of the European Union],* 'Studia Prawa Publicznego' 2015, no. 4(12), p. 11 and following.

[49] STUC(LO) and SCPE(TCO) v. Sweden, complaint no. 85/2012, Decision on admissibility and the merits adopted on 3.7.2013, paras 10, 75-78.

[50] STUC(LO) and SCPE(TCO) v. Sweden, supra, para. 72. The ECSR also underlined, that "It is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the transposition of a European Union directive into domestic law may affect the proper implementation of the Charter" – ibidem, in fine.

[51] STUC(LO) and SCPE(TCO) v. Sweden, supra, para. 73. See also: Laval un Partneri Ltd. v. Svenska Bygnaadarbtareforbundet, Case C-341/05, judgment of 18.12.2007, ECLI:EU:C:2007:809 (hereinafter referred to as "Laval Case").

and consultation (Article 21), participation in the determination and improvement of working conditions and the working environment (Article 22), protection in cases of termination of employment (Article 24), protection of workers' claims in the event of the insolvency of their employer (Article 25), dignity at work (Article 26), the protection of workers' representatives in the undertaking and the facilities to be accorded to them (Article 28), information and consultation in collective redundancy procedures (Article 29).[52]

The Committee with utmost precision has investigated the right to collective bargaining, stressing its almost common "constitutional recognition at the national level in the vast majority of the Council of Europe's member States" and in international and EU sources[53], as well as limitations of this right in the context of foreign companies[54], to finally reach a conclusion that "as regards posted workers, the legislative restrictions and limitations, described (...) above, do not promote the development of suitable machinery for voluntary negotiations between employers and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements" and are not in conformity with Article 6(2) of the Charter.[55]

With regard to Article 6(4) of the Charter, the Committee has confirmed, that it "recognises the right to collective action", which besides the right to strike, "encompasses other types of action taken by employees or trade unions, including blockades or picketing".[56] It has also reiterated the importance of the Appendix to the Charter, which in the part relating to Article 6(4) states that "[E]ach Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms

[52] STUC(LO) and SCPE(TCO) v. Sweden, supra, para. 109.

[53] STUC(LO) and SCPE(TCO) v. Sweden, supra, para. 110. See on the core and meaning of the right to collective bargaining – STUC(LO) and SCPE(TCO) v. Sweden, supra, para. 112.

[54] See on the troubles of foreign companies – STUC(LO) and SCPE(TCO) v. Sweden, supra, paras 113-115.

[55] STUC(LO) and SCPE(TCO) v. Sweden, supra, para. 116.

[56] STUC(LO) and SCPE(TCO) v. Sweden, supra, para. 117. However, "even though the right of trade unions to collective action is not an absolute one", because it must be considered in conformity with Article G RESC and fulfil its tests, moreover this does not exclude the legal prohibition of "excessive or abusive forms of collective action, such as extended blockades" – see STUC(LO) and SCPE(TCO) v. Sweden, supra, paras 118-119.

of Article G". [57] The Committee has meticulously analysed limitations arising for employees working abroad, as well as partial amendments to Swedish law and practice,[58] to finally reach a conclusion that national legal acts "do not adequately recognise the fundamental right to collective action and therefore are not in conformity with article 6(4) of the Charter".[59]

The case law of the Committee in the context of social rights during the economic crisis in Greece is significant. In the first case mentioned below, the complainant organisations, not revoking Article 31 of the Charter explicitly, alleged that Greece breached its obligations under Article 4(4) due to equating the first twelve months of employment in an open-ended contract with a trial period, and thus making dismissal without notice or compensation possible during this period.[60] The ECSR firmly stated that "the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter" due to the fact, that the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most".[61] Before that the ECSR has reminded us of its findings made in the XIX supervisory cycle that even if during crisis and times of increased levels of unemployment "the number of beneficiaries increase while tax and social security contribution revenues decline", the Parties, by acceding to the 1961 Charter, "have accepted to pursue by all appropriate means, the attainment of conditions in which *inter alia* the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised."[62]

It is a highly humanitarian approach, which is consistently confirmed in numerous cases against Greece, which was accused of violating the Article 12(3) and Article 31 of the Charter of 1961 as a result of changes in public

[57] STUC(LO) and SCPE(TCO) v. Sweden, supra, para. 116. See *European Social Charter...*, ibidem, p. 28 and 69, as to the ESC and RESC, respectively.

[58] STUC(LO) and SCPE(TCO) v. Sweden, supra, paras 119-124.

[59] STUC(LO) and SCPE(TCO) v. Sweden, supra, para. 125 and Conclusion.

[60] GENOP-DEI and ADEDY v. Greece, complaint no. 65/2011, Decision on the merits adopted on 23.5.2012, para. 6.

[61] GENOP-DEI and ADEDY v. Greece, supra, para. 16 in fine.

[62] GENOP-DEI and ADEDY v. Greece, supra, para. 16. See also: General Introduction, [in:] 'Conclusions XIX-2(2009)'.

and private pension schemes, which were introduced due to the crisis.[63] In its remarks the European Trade Union Confederation (ETUC) highlighted the need to seek such an interpretation of the Charter "in order to best achieve its object and purpose" and highlighted that "economic or financial aims are not listed in Article 31(1) of the 1961 Charter as grounds for legitimately limiting the rights guaranteed therein", therefore reductions made in pensions are "not in keeping with the obligation of states parties under Article 12 to progressively raise the system of social security to a higher level."[64]

In connection with invoking Article 31 of the Charter by the complainants, the Committee reiterated that "Article 31 of the Charter cannot be directly invoked as such, but only provides a reference for the interpretation of the substantive rights provisions of the Charter, which are at stake in a given complaint"; therefore it reached a conclusion that the complaint in question "was admissible only with regard to the elements of the complaint that related to Article 12(3)."[65] It is the author's view that it was not the most appropriate explanation, since the examination of the allegations on the basis of Article 12(3) in general does not preclude them from being analysed in the light of criteria of Article 31 of the Charter; and even if it does, it happens so due to the considerations outlined by the ETUC.

Further remarks made by the Committee in these cases against Greece are worth tracing. In the face of the crisis, on the basis of Article 12(3) of the Charter, it is necessary for the state party to maintain its social security system "on a satisfactory level that takes into account the legitimate expectations of beneficiaries of the system and the right of all persons to effective enjoyment of the right to social security"; this

[63] See: IKA-ETAM v. Greece, supra, para. 9; POPS v. Greece, supra, para. 9; I.S.A.P. v. Greece, supra, para. 9, POS-DEI v. Greece, supra, para. 9; ATE v. Greece, supra, para. 9.

[64] IKA-ETAM v. Greece, supra, para. 12; POPS v. Greece, supra, para. 12; I.S.A.P. v. Greece, supra, para. 12, POS-DEI v. Greece, supra, para. 12; ATE v. Greece, supra, para. 12.

[65] IKA-ETAM v. Greece, supra, para. 48; POPS v. Greece, supra, para. 44; I.S.A.P. v. Greece, supra, para. 44, POS-DEI v. Greece, supra, para. 44; ATE v. Greece, supra, para. 44.

requirement arises from the obligation of the states to endeavour to raise progressively the system of social security to a higher level.[66]

The Committee lacked consistency: it has previously dismissed the possibility to revoke Article 31 of the Charter, while at the same time it has restored it to favour by reminding us that "when issuing provisions that will restrict the rights guaranteed in the 1961 Charter, the states parties must pursuant to Article 31 of the 1961 Charter be capable of establishing that any restrictions or limitations are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals and thus in line with Article 31."[67]

The Committee has reached the conclusion that due to close relations between economic and social rights, "the pursuit of economic goals is not incompatible with Article 12(3)",[68] such restrictions, however, arising from economical and demographical factors – to be in line with the Charter – must take into account

> "the following criteria:
> 'a. the nature of the changes (…);
> b. the reasons given for the changes and the framework of social and economic policy in which they arise; the extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);
> c. the necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued);
> d. the existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made; and
> e. the results obtained by such changes'."[69]

[66] IKA-ETAM v. Greece, supra, para. 69; POPS v. Greece, supra, para. 65; I.S.A.P. v. Greece, supra, para. 65, POS-DEI v. Greece, supra, para. 65; ATE v. Greece, supra, para. 65.

[67] IKA-ETAM v. Greece, supra, para. 70; POPS v. Greece, supra, para. 66; I.S.A.P. v. Greece, supra, para. 66, POS-DEI v. Greece, supra, para. 66; ATE v. Greece, supra, para. 66.

[68] IKA-ETAM v. Greece, supra, para. 71; POPS v. Greece, supra, para. 67; I.S.A.P. v. Greece, supra, para. 67, POS-DEI v. Greece, supra, para. 67; ATE v. Greece, supra, para. 67.

[69] IKA-ETAM v. Greece, supra, paras 71-72; POPS v. Greece, supra, paras 67-68; I.S.A.P. v. Greece, supra, paras 67-68, POS-DEI v. Greece, supra, paras 67-68; ATE v. Greece, supra, paras 67-68. See also *General Introduction*, [in:] 'Conclusions XIV-1', p.11.

Yet, the Committee has highlighted that it should be ensured that the burden of the reforms did not weigh too heavily on "the economically most vulnerable households" and by the income of the elderly from pensions "should not be lower than the poverty threshold".[70] While upholding its view of the impact made by the crisis on the social rights, described above in connection with *GENOP-DEI and ADEDY v. Greece*,[71] the ECSR has deemed that some restrictions "do not in themselves amount to a violation of the 1961 Charter",[72] but also pointed out that "the cumulative effect of the restrictions, as described in the information provided by the complainant trade union (...), and which were not contested by the Government, is bound to bring about a significant degradation of the standard of living and the living conditions of many of the pensioners concerned".[73]

The ECSR has highlighted the miscellaneous shortcomings of the Greek authorities, including the fact that the Government "has not established, as is required by Article 12(3), that efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about a large scale pauperisation of a significant segment of the population (...)".[74] All in all, the Committee found that national rules "due to the cumulative effect of the restrictive measures and the procedures adopted to put them into place" constitute a violation of Article 12(3) of the 1961 Charter.[75]

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[70] IKA-ETAM; supra, paras 73-74; POPS v. Greece, supra, paras 69-70; I.S.A.P. v. Greece, supra, paras 69-70, POS-DEI v. Greece, supra, paras 69-70; ATE v. Greece, supra, paras 69-70. See also: 'Conclusions XIV-1', regarding Finland and 'Conclusions 2009', regarding Finland, France and Ireland.

[71] See above, p. 14.

[72] IKA-ETAM; supra, para. 77. It was about the restrictions introduced in respect of holiday bonuses or the restrictions as to the early retirements.; POPS v. Greece, supra, para. 73; I.S.A.P. v. Greece, supra, para. 73, POS-DEI v. Greece, supra, para. 73; ATE v. Greece, supra, para. 73.

[73] IKA-ETAM v. Greece, supra, para. 78; POPS v. Greece, supra, para. 74; I.S.A.P. v. Greece, supra, para. 74, POS-DEI v. Greece, supra, para. 74; ATE v. Greece, supra, para. 74.

[74] IKA-ETAM v. Greece, supra, para. 81, see also paras 79-80; POPS v. Greece, supra, paras 75-77; I.S.A.P. v. Greece, supra, paras 75-77, POS-DEI v. Greece, supra, paras 75-77; ATE v. Greece, supra, paras 75-77.

[75] IKA-ETAM v. Greece, supra, para. 83. It has been highlighted before – invoking the Strasbourg Court jurisdiction in cases on pensions that "the restrictive measures

5. Conclusions

In view of the above, the ECSR up to now had not had the opportunity to state its position and practical standing with regard to the mechanism of derogation of the obligations set out in ESC/RESC, which is formally stated in Article 30 ESC and Article F RESC. At the moment, this provision is a dead letter, but it seems that there is no sufficient basis for excluding its usefulness for the future, since the state parties themselves do not formally waive it.

Subsequently the mechanism of limitation of the enjoyment of human rights, based on Article 30 of the 1961 ESC and in Article G of the 1996 RESC, was cautiously taken into account by the Committee, especially during the examination of the reports submitted by state parties and formulating its assessments in the shape of further Conclusions. In fact, it was not until subsequent supervisory cycles, especially the XIV and XIX supervisory cycle, that the Committee, apart from random interpretative sentences, made deeper interpretative remarks.

With regard to the actions of the Committee in the collective complaints procedure, Article 31 of ESC or Article G of RESC raised its interest in the context of right to collective action, including the right to strike and to picketing activities based on Article 6(4) ESC/RESC. It is true that while meticulously analysing especially the test of the rule of law, but also of suitability, the Committee – not precluding the right of states to introduce restrictions on the right to strike – has set strict requirements for national legislation and has undermined the admissibility of general bans to the right to strike in particular areas or for particular groups of employees e.g. civil servants. It has, in fact, cared for the test of necessity by making sure that restrictions introduced by states are directly connected with protected lawful aims and are genuinely necessary for their realisation.

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at stake, which appear to have the effect of depriving one segment of the population of a very substantial portion of their means of subsistence, have been introduced in a manner that does not respect the legitimate expectation of pensioners that adjustments to their social security entitlements will be implemented in a manner that takes due account of their vulnerability, settled financial expectations and ultimately their right to enjoy effect access to social protection and social security." – IKA-ETAM v. Greece, supra, para. 82; POPS v. Greece, supra, paras 78-79; I.S.A.P. v. Greece, supra, paras 78-79, POS-DEI v. Greece, supra, paras 78-79; ATE v. Greece, supra, paras 78-79.

It is worth noting the decisions of the Committee made in the context of the economic crisis, namely the Greek crisis. The Committee reluctantly agreed for taking into account in this regard Article 31 / Article G and – although it has not excluded its application by the state – parties in a certain context stood firmly and principally in defence of the rights of persons and groups most disabled, including pensioners and poorest persons. However, the Committee did not clearly uphold the position of the European Trade Union Confederation, which highlighted that among lawful aims arising from Article 31 / Article G of the Charter one cannot find any economic or financial grounds. All in all, the case law of the Committee in this regard shows an extremely humane side by standing on the side of the most disabled, and this must be acknowledged.

As a result the mechanism of the limitation of the enjoyment of human rights, designed as a facilitation to carrying out obligations by the state parties, lost its etatist character and obtained a genuinely humane nature.

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