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The Contributions of International Bodies of the Protection of Social Rights to the Struggle with Deregulation

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Abstract Globalization, increase in competitiveness, progressing economic integration and the "austerity" measures due to the European Union (EU) actions during the last economic crisis, especially in so-called GIPSI countries, have strongly deteriorated the relationship between social rights and economic freedoms. This made international instruments for protection of social rights more relevant than ever for resisting this re-balance. The aim of this article is to research the contributions of the International bodies to this prosess and reveal their actual role in the sphere of protection of social rights.

Summary 1. Introduction. – 2. National Cases. – 2.1 Italy. – 2.2. Greece. – 3. The Supervisory Mechanisms of International instruments for Protection Social Rights. – 3.1. International Committee on Economic, Social and Cultural Rights. – 3.2. The ILO and the European Committee of Social Rights (ECSR). – 3.3. European Court of Human Rights. – 4. Conclusions.

1 Introduction

According to the European Parliament, "fundamental social rights" are the rights to which «every individual citizen is entitled, that are a necessary compliment to civil rights and liberties, since the latter cannot be enjoyed without a minimum of social security». During the last decades the relation between economic freedoms and fundamental social rights

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is suffering a re-balance due to globalization, economic crisis, European integration and international economic cooperation. It leads to undermining the fundamental *status* of these rights and to evident deregulation in the spheres of protection of labour and social security rights.

Confronting this re-balance is a complex task as it is not only legal or political, but also an economic problem, especially in the context of such European countries as Greece, Ireland, Portugal, Italy or Spain where the Troika[1] imposes mandatory instructions aimed at reducing budget deficits, which in practice lead to deterioration of social rights protection at national level.

How can International bodies ensure compliance with human rights standards where deregulation was a result of austerity measures? We suppose that in these circumstances the focus must be made on the role of international bodies in the enforcement of international labour standards at national level.

In this regard, the aim of the article is to research whether international instruments are capable of resisting the process of deterioration of social rights and clarify their role in the situation where national States are forced to deregulation by financial institution. In order to answer these questions we will analise the examples of Italy and Greece in order to understand whether international bodies were capable to contribute to the struggle for protection of social rights, we will further make a brief overview of the international instruments and bodies, created for the supervision and protection of social rights, focusing on the recent jurisprudence and trying to reveal the position of these bodies towards recent reforms.

2 National Cases

2.1 Italy

The reform of Italian labour market has been initiated by the European Central Bank. The "Letter"[2] sent to the Italian Government set out the European authorities' requests for the reform to achieve the balanced budget, to tighten the criteria for the calculation of retirement pensions, to make labour market more flexible, especially by improving the outgoing flexibility, to simplify dismissal procedures, reducing costs for the com-

1 European Commission, International Monitory Found and European Central Bank.

2 The text of the letter can be found in http://www.ilsole24ore.com/art/notizie/2011-09-29/testo-lettera-governo-italiano (2014-11-19). On this subject, see *amplius* A. Perulli, V. Speziale, *L'articolo 8 della legge 14 settembre 2011, n. 148 e la "rivoluzione d'Agosto" del Diritto del lavoro* [Article 8 of Law September 14, 2011, n. 148 and the "Revolution of August" of the Labour Law], in *WP CSDLE "Massimo D'Antona". IT – 132/2011*, p. 14.

pany, and to modify the collective bargaining system, enhancing the role of enterprise bargaining.

Italy has implemented the policy approach advocated by the European institutions, primarily through a reform of the relationship between collective agreements at different levels[3], giving the plant-level collective agreements and agreements concluded at regional level a wide margin of derogation in a manner unfavourable for workers from the legal regulation and national collective agreements, although delimited by the indication of specific goals within which such power may be exercised[4]. The reform also has given the decentralized collective agreements signed by workers' associations comparatively most representative on the national or territorial level or by their trade unions in the company[5] an exceptional effectiveness *erga omnes*, which has raised issues of unconstitutionality in relation to art. 39 of the Constitution[6].

The pension reform[7] raised the retirement age and established the transition from the pay system to contribution system, in order to reduce the impact of the pension system on public spending, in view of the objective of balanced budget, newly constitutionalized[8].

In accordance with the principle of balanced budget, the Italian legislator also some rules restricting the guarantees of some expensive social rights, providing, for example, the temporary freeze of the indexing for

3 Art. 8, l. 148/2011.

4 Pursuant to the same provision is necessary, in fact, that the agreements are made in order to create quality jobs, to manage the crisis of enterprise, to increase competitiveness and attract foreign investment. So companies have used this possibility to derogate: there are, for instance, company agreements which suspend the effectiveness of certain rules of law for a certain period of time (Agreement between Golden Lady Company S.p.A. and national federations CGIL, CISL and UIL textile July 16, 2012), agreements which derogate from the legal regulation in the field of installation of audiovisual systems by the employer (Company agreement of Banca Popolare di Bari February 2, 2012), agreements derogating from the legal regime of solidarity in procurement (Company agreement of ILVA S.p.A. Paderno Dugnano of 27 September 2011).

5 The rules for the determination of that representativeness have been outlined by the Cross-Industry Agreement of 28 June 2011, the Cross-Industry Agreement of 5 May 2013, and finally from the Consolidated Representation Agreement of 14 January 2014.

6 The fourth paragraph of art. 39 Const. allows to stipulate collective agreements binding for all workers only to registered trade unions; this part of the rule, however, has not been implemented so today a law conferring the predicted effect *erga omnes* collective agreement by a procedure different from the art. 39, fourth paragraph, shall be considered unconstitutional. See generally, on the subject, V. Leccese, *Il diritto sindacale al tempo della crisi. Intervento eteronomo e profili di legittimità costituzionale* [The trade-union law in the time of crisis. Intervention heteronymous and profiles of constitutionality], in *Giorn. dir. lav. rel. ind.*, 2012, IV, p. 479 ff.

7 L. 214/2011.

8 Article 81, Co. 1, Const., as amended by Constitutional law n. 1/2012.

pensions exceeding three times the minimum[9], and block of collective bargaining in the public sector[10].

However, Italian Constitutional Court recently declared the unconstitutionality of such provisions, as conflicting with the principles of equality, proportionality and sufficiency of wages, the adequacy of social security benefits, as well as freedom of trade union action[11].

In 2012, the discipline of individual dismissal[12] was completely reformed. Indeed, new edition of article 18 L. 300/1970 provides that the unfair dismissal ordered in big companies does not involve, necessarily, the full reinstatement, but also, according to the different reasons of the unfairness, a remedy more bland, which the weak reinstatement, or, even, merely an indemnity: strong monetary compensation or weak monetary compensation. The reform, therefore, implements a change in the discipline aimed at facilitating the withdrawal of the employer, as well as the most expeditious settlement of disputes relating to dismissal, through the introduction of a special procedure for judgments concerning the legitimacy of the dismissal. These changes are partly based on previous conclusions of the Constitutional Court which once established that the reinstatement is not "constitutionally needed"[13]. The L. 92/2012 also introduced, *inter alia*, the possibility of concluding an unjustified initial fixed-term contract. Later, with the L. 78/2014, the need for causal justification of fix term contract has been completely eliminated.

Recently, in 2015, the current Italian Government adopted a series of important reforms of labour discipline (the so-called "Jobs Act"), that introduced a new type of employment contract with different rules of dismissal[14], in which the hypothesis of reinstatement has been further reduced[15].

9 Art. 24, co. 25, L. 214/2011.

10 L. 122/2010, L. 111/2011 and especially L. 190/2014.

11 Italian Constitutional Court judgments 70/2015, available at: http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2015&numero=70, and 178/2015, in: http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2015&numero=178. On topics, see M. Barbieri, M. D'Onghia, *La sentenza n. 70/2015 della Corte Costituzionale* [Judgment no. 70/2015 of the Constitutional Court], in *WP C.S.D.L.E. "Massimo D'Antona". Collective Volumes – n. 4/2015* and L. Zoppoli, *La Corte finalmente costituzionalizza la contrattazione per il lavoro pubblico. E la retribuzione?* [The Court finally recognizes constitutional status of bargaining for public work. And wages?], in *Dir. Lav. Merc.*, 2015, no. 2.

12 For a more comprehensive examination of the topic, please see M. Biasi, *The effect of the global crisis on the labour market: report on Italy*, in *Comp. lab. law pol. journ.*, 2014, 35-3, p. 371 ff.

13 Constitutional Court, sentence of February 7, 2000, n. 46.

14 Legislative decree 23/2015.

15 Reinstatement remains only in residual hypotheses, such as the oral dismissal or for discriminatory one, invalid layoffs by express provision of law, unjustified dismissal re-

In any other case, the protection is only a growing economic benefit based on length of service.

The "Jobs Act" also regulated again many types of employment contracts[16], following a flexibility perspective and giving wide margin of derogation to collective bargaining, even at plant and regional level.

The evident deterioration of protections for workers has led commentators to emphasize contradictions between the anti-crisis measures adopted in Italy on the basis of European requirements and the principles and rules arising from international conventions and European law.

In particular the ILO Convention n. 158 relating to layoffs, which precludes the regulation of this institution with the means of collective bargaining, and the ILO Convention n. 132 which sets out the minimum guarantees for paid annual leave to each worker.

In this contradiction, the power of derogation granted to the decentralized collective bargaining might be constrained by International bodies or by direct implementation of International instruments. According to some commentators[17], the national court may directly declare illegal the collective bargaining agreement that violates them, while others[18] say that national courts would have to raise a preliminary question to the Constitutional Court, the ECJ or the International Court of Justice of the ILO.

International bodies have paid little attention to the current reforms. European Court of human rights considered Italian cases of reductions of pensions and found a violation in the case Maggio and others v. Italy[19]: in particular, the ECtHR held that retroactive changes of the rules for calculating pensions for Italian workers who had worked in foreign countries and made relevant contributions in these countries violate the right to a fair trial enshrined in art. 6, par. 1, of the Convention[20]. Italian Constitutional Court was very reluctant to re-evaluating the rel-

lated to physical or mental disability of the employee or ordered in the complete absence of disciplinary reasons.

16 Legislative decree 81/2015.

17 F. Carinci, *Al capezzale del sistema contrattuale: il giudice, il sindacato, il legislatore* [At the bedside of the bargaining system: the judge, the union, the legislator], in *WP C.S.D.L.E. "Massimo D'Antona".IT - 133/2011*.

18 E. Ales, *Dal "caso Fiat" al "caso Italia". Il diritto del lavoro di prossimità, le sue scaturigini e i suoi limiti costituzionali* [Since "the Fiat" to the "Italian case". The decentralised labour law, its sources and its constitutional limits], in *Dir. rel. ind.*, 2011, p. 1061 ff.

19 ECtHR, 31 May 2011, cases No. 46286/09, 52851/08, 53727/08, 54486/08 e 56001/08, *Maggio and others v. Italy*.

20 See also ECtHR, 07 June 2011, cases No. 43549/08, 6107/09 and 5087/09, *Agrati and Others v. Italy*.

evant legislation. It ignored the ruling of the ECtHR and considered that contested provision balanced with other constitutional values complied with the Constitution.[21]

As a more positive example of international influence on the level of protection of social rights in Italy we might remember the decision of the Constitutional Court n. 223/2012, where with the reference to the European convention of human rights, the reductions of pensions for judges were held unconstitutional[22]. It is especially interesting to note, that ECtHR heard a similar case versus Georgia just four months before and came to the opposite conclusion[23]. Thus we can presume that the Constitutional Court is a kind of filter of the experience and legal provisions of the ECtHR, which are implemented in case of their "suitability".

All these reforms, make us think that the load of Italian applications to international bodies might rise considerably. In the light of ECtHR decisions in Volkov v. Ukraine[24] and Redfearn v. United Kingdom[25], the main attention might be in future attracted to legal positions of this body.

2.2 Greece

In May 2010, Greece signed the first *Memorandum*, which required the implementation of austerity measures to meet specific deficit reduction targets[26]. The measures required by this and later *memorandum* were used to aggressively implement massive social and economic reform. Among the most vivid examples of the deterioration in the level of guaranteed social rights we will note the raise of the legal retirement age from 64 to 67,

21 Judgment 248/2012 and ordinance 10/2014.

22 See Italian Constitutional Court judgment n. 223/2012 that held unconstitutional the reduction of pensions of former judges, available at: `http://www.cortecostituzionale.it/actionschedapronuncia.do?anno=2012&numero=223` (2014-10-20).

23 EctHR, 19 June 2012, case No. 17767/08, *Khoniakina v. Georgia*.

24 In this case for the first time in its history, the ECtHR ordered a Member State to reinstate unfairly dismissed applicant, see EctHR, 9 January 2013, case No. 21722/11, *Oleksandr Volkov v. Ukraine*.

25 In this case the Court considered the provisions of the Employment Rights Act 1996 which required one year's service before an employee could bring an action for unfair dismissal: this qualifying period did not apply where the dismissal was on grounds of pregnancy, race, sex or religion. The Court found these norm to be incompetitable with the European Convention when unfaire dissmissal was due to political views of an employee. See EctHR, 6 Novermber 2012, case No. 47335/06, *Redfearn v. United Kingdom*.

26 Esposito, *Constitutions Through The Lens Of The Global Financial Crisis: Considering The Experience Of The United States, Portugal, And Greece*, in *Law School Student Scholarship,* 2014, paper No. 461, p. 23.

pension cuts, salary cuts for public employees, abolishment of Christmas, Easter and summer bonuses for pensioners[27] and the reduction of minimal wage (especially in regard of young workers) through the state intervention in suspending or modifying the effects of existing collective agreements[28].

Greek austerity measures were the subject of concern of the most important International bodies, namely the CFA[29], ECSR and the ECtHR. The CFA refrained from condemning the austerity measures and, taking into account current circumstances which are "grave and exceptional", limited its recommendations to the proposal of promotion and strengthening of the institutional framework for collective bargaining and social dialogue.[30]

The ECtHR and the ECSR seem to propose a deeper approach to the violations of social rights in Greece. Both bodies have dealt with the reductions of pensions. The ECtHR in *Koufaki and ADEDY v. Greece*[31] decided that Greek austerity measures did not overstep the limits of the margin of appreciation of the state and thus did not violate the European convention. Answering the question whether the interference was in public interest the Court largely relied on the conclusions of the Supreme Administrative Court of Greece. The Court held both applications inadmissible as it came to conclusion that the State ensured fair balance between the demands of the general interest of the community and the requirements of the protection of the fundamental rights of the first applicant and the second applicant's members. In the admissibility decision, the ECtHR noted the observation of the Greek court that the applicants had not claimed that they risked falling below the subsistence threshold. This observation might be interpreted as posing "subsistence threshold" for justification of austerity measures.

Another approach to estimation of Greek austerity measures was adopted by the ECSR two months before the decision of the ECtHR. The Commit-

27 See The Conclusion of the European Committee of Social Rights XX-2 (Greece), adopted in November 2014. Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/GreeceXX2en.pdf (accessed 20 October 2014).

28 See I. Katsaroumpas, *EU Bailout Conditionality as a De Facto Mode of Government: A Neo-Liberal 'Black Hole' for the Greek Collective Labour Law System?*, *Critical Quarterly for Legislation and Law (CritQ)* 96, 2013, 4, pp. 345-386, available at SSRN: http://ssrn.com/abstract=2446899 (2014-10-20).

29 ILO Committee of Freedom of Association, *Conclusions on Case No. 2820 (Greece)*, in *365th Report on*

30 *Ibid.*, par. 1003.

31 ECtHR,7 May 2013, case No. 57665/12 and 57657/12, *Koufaki and Adedy v. Greece*.

tee considered five collective complaints[32] related to austerity measures. It came to the conclusion that even though restrictions to the benefits available in a national social security system do not under certain conditions breach the Charter, the cumulative effect of restrictions introduced as "austerity measures", together with the procedures applied to put them into place, may amount to a violation of the right to social security. The position of the ECSR is very important even if it is not legally binding. It can encourage claims for protection from austerity measures in domestic courts. For instance, in January 2014 the Greek Council of State stated that the government's cuts to the wages of police and armed forces employees violated the Constitution. In February it ruled that a tax on benefits for university staff members and cuts to civil servants' pensions were illegal. The same month the Greek Supreme Court found that a property tax introduced in 2011 as an emergency measure and later extended was unconstitutional[33]. These examples show that the legal and moral support of International bodies in the sphere of protection of social rights has become more important than ever for the national judiciary that every day faces the necessity to balance social rights and economic interests.

3 The Supervisory Mechanisms of International Instruments for Protection Social Rights

The idea of developing economy productivity and performance together with the social justice has been laid down in all the instruments for protection of social rights and is still present[34]. In the report devoted the challenges of globalization ILO have emphasized that «The rules of the global economy should be aimed at improving the rights, livelihoods, security and opportunities of people, families and communities around the world»[35].

32 ECSR, complaint No. 76/2012, *Federation of Employed Pensioners of Greece (IKA–ETAM) v. Greece*; ECSR, complaint No. 77/2012, *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*;ECSR, complaint No. 78/2012, *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*;ECSR, complaint No. 79/2012, *Panhellenic Federation of Pensioners of the Public Electricity Corporation(POS-DEI) v. Greece*; ECSR, complaint No. 80/2012, *Pensioner's Union of the Agricultural Bank of Greece(ATE) v. Greece*, became public on 22 April 2013.

33 `http://www.nytimes.com/2014/06/13/world/europe/greece-wars-with-courts-in-struggle-to-slash-budget.html?_r=0` (accessed 22.10.2014).

34 See the Constitution of International Labour Organisation (ILO) – that states that lasting peace can be established only if it is based on social justice – Declaration of Philadelphia, The European Social Charter (ESC).

35 ILO, *A Fair Globalization: Creating opportunities for all. Report of the World Commission on the Social Dimension of Globalization*, Geneva, 2004, pp. 136-156.

Scholars note that core labour standards can serve as a protection aganist economic downturn[36].

The ILO standards, the International Covenant on economic, social and cultural rights and the European Social Charter (ESC) are equipped with the mechanisms of control of the member States' compliance with accepted obligations. It has to be emphised, that the international supervisory bodies did not analyse the EU law but control instead the situation at the national level[37]. This point of view was hold during the examination of the "austerity" measures that has been brought by EU action due to the time of economic crisis and the decision of ECJ in *Viking and Laval* case which had a strong impact on the situation at national level. According to M. Rocca, Member States, as a result, «find themselves between the proverbial rock and a hard place: on the one hand they must apply EU law, on the other they are bound to respect of the obligations stemming from international agreements they have ratified»[38].

Further we will consequently deal with the international systems of social rights protection in order to reveal their legal positions on current deregulation and the efficiency of their decisions.

3.1 International Committee on Economic, Social and Cultural Rights

International Committee on Economic, Social and Cultural Rights was created for supervision of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Consideration of the State's reports on realization of the provisions of the Covenant is the main method of supervision. Another way of monitoring was established by Optional protocols that came into force in 2013. It is based on the individual communication of violation. As a result of both procedures the Committee may issue recommendation to the State-party, violating the Covenant.

36 See E. Lee (1998), *The Asian financial crisis: the challenge for social policy*, ILO, Geneva, 1998, see also D. Kucera who argues that there is little evidence for the belief that non-respect of labour standards leeds to greater country competetiveness in the global economy: D. Kucera, *Core labour standards and foreign direct investments*, in *International Labour Law Review*, 2002, Vol. 141, No. 1-2, pp. 31-70.

37 See the European Committee of Social Rights, Decision on Admissibility and the Merits on 3 July 2013, Complain No. 85/2012, *Swedish Trade Union Confederation and Swedish Confederation of Professional Employees v. Sweden*, par. 74; International Labour Conference, 99th Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 2010, pp. 208-209.

38 M. Rocca, *Enemy at the (flood) gates. Bringing the EU back to social justice through the international protection of social rights. A legal perspective*, in http://www.socialjustice2014.org/papers/, 2014, p. 38.

In spite of evident deterioration in the protection of social rights in the recent years, during 2014 the Committee on Economic, Social and Cultural Rights did not consider any individual case concerning labour or social security rights[39].

Thus the only source of estimating the activity of the Committee in the field of protection of social rights is the analysis of concluding considerations of the States' reports.

Analysis of the Concluding observations adopted by the Committee of Economic, Social and Cultural rights in 2014 reveals that countries tend to adopt legislation recommended by the Committee but often it remains unenforced and unable to resolve the problem pointed by the Committee. The phrases "the Committee reiterates" or "remains concerned" are often used while speaking about the most problematical issues such as discrimination in employment[40], social security[41], or trade unions' rights[42].

The Committee elaborated the system of estimation of austerity measures, which represents a kind of guidelines for the States, teaching how to imply austerity measures without violating the International Covenant. These "guidelines" were published in the Open letter to the State-parties, issued after considering the Spanish report in May 2012[43]. According to the Committee's approach to "due" austerity measures, they have to be: 1. a temporary measure covering only the period of the crisis; 2. necessary and proportionate; 3. not discriminatory; 4. must respect the minimum core content of rights as defined by ILO.

This view of the Committee is very arguable, as it leaves white spots and ambiguities. Three out of four requirements are subjective in nature, the fourth one has very limited reference to social rights and leaves aside

39 There were only two communications registered by Committee of Economic, Social and Cultural rights under Available at: *http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14638&LangID=E#sthash.cSXJ8VEs.dpu* (accessed 29 august 2014).

Optional Protocol to the CESCR, the Committee is now awaiting the response of the State party (Spain). See Press release *Committee on Economic, Social and Cultural Rights concludes its fifty-second session*, 24.05.2014, All the reports are available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=820&Lang=en (2014-08-29).

40 See Cescr, *Concluding observations of the Committee on Economic, Social and Cultural Rights on the combined third, fourth and fifth periodic reports of El Salvador*, adopted on the 19 th june 2014, par. 10.

41 See Cescr, *Concluding observations of the Committee on Economic, Social and Cultural Rights on the second periodic report of Lithuania*, adopted on the 24th June 2014, par. 10.

42 See Cescr, *Concluding observations of the Committee on Economic, Social and Cultural Rights on the second periodic report of China*, adopted on the 13th June 2014, par. 23.

43 Cescr, *Open Letter to States Parties regarding the protection of rights in the context of economic crisis* available at: http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf (2014-08-12).

any social security right. Applying this approach the Committee found that the austerity measures adopted in Spain[44] and in Czech Republic[45] harm the most vulnerable groups and individuals and are disproportionate. States were recommended to reconsider adopted measures. Though neither Spain nor Greece have fulfilled this recommendation, attempting to look at the situation in the optimistic way, we can presume that domestic courts might use the conclusions of the Committee considering individual claims on austerity measures, thus rendering them some "binding effect".

Therefore the powers of the ICESCR in protection of social rights are not totally "toothless", but still its "teeth" are evidently not enough sharp to ensure due implementation of core labour and social security rights in the era of crisis.

3.2 The ILO and the European Committee of Social Rights (ECSR)

The primary system of control over State's compliance with ILO and ESC provisions is based on considering the periodic national reports.

Both ILO and European Social Charter supervisory system do not grant an individual the right to file a claim agains member States[46]. The system of supervision of the European Social Charter was complemented with additional system of collective complaints procedure in 1998 in order to «increase the efficiency of supervisory machinery»[47]. However, the system of collective complains is optional for countries. Only 13 countries, that is one-third of the parties of the ESC, have accepted it. The right to file complaint to European Committee of Social Rights (ECSR) is entiteled to the social partner organisations and non-governmental organisations (NGOs). The total amount of 110 complaints that have been examinated within this procedure since 1998 reveals its small popularity and importance.

Also ILO supervisory system provides for special additional procedures of 'collective' representations and complaints[48]. The analysis of cases within the procedure of representation shows that most of the applica-

44 Cescr, *Concluding observations on the fifth periodic report of Spain*, adopted on the 6th June 2012, E/C.12/ESP/CO/5, par. 8, Cescr, *Concluding observations on the second periodic report of the Czech Republic*, adopted on the 22th June 2014, E/C.12/CZE/CO/2, par. 14.

45 Cescr, *Concluding observations on the second periodic report of the Czech Republic*, cit., par. 14.

46 The deputy at International Labour Conference provide an exceptionas it is entiteled to file a complaint agaist member states (art. 26 ust. 4 of the ILO Constitution).

47 Explanatory Report on the Protocol 26 at. 2, adopted in 1995.

48 With the exception for the deputy at International Labour Conference.

tions were lodged by employee's organisations[49]. During the complaint examination the Governing Body may recommend to the International Labour Conference (ILC) such action as it may deem wise and expedient to secure compliance of the country's legislation with the international labour standards. For example, in 2000 in the Mayanmar case ILC adopted the resolution in which it «recommended to the Organization's constituents as a whole – governments, employers and workers – to review the relations that they may have with the member State concerned and take appriopriate measures to ensure that the said member State cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour»[50].

The Committee on Freedom of Association (CFA) is another element of the ILO system of supervision. It deals with the complaint regarding freedom of association and collective bargaining that demonstrates a great importance of both principles. The total amount of complaints that are examinated anually by CFA shows the growing importance of this procedure based on tripartism[51].

All legislative measures adopted in the GIPSI countries in respond to the *Memoranda* of Understanding, has been the subject of the severe control of international bodies in terms of its compliance with international standards adopted in ILO Conventions and ESC[52].

The CEACR (Committee of Experts on the Application of Conventions and Recommendations) has analysed the impact of *Viking and Laval* case on social rights at national level two times. In so-called *BALPA* case[53] and related to the so-called *Lex Laval* that was a package of amendements introduced in Sweden Posting on Workers Act and Co-determination Act[54]

49 See NORMLEX database.

50 See *Report of the Commission of Inquiry under the article 26 of the Constitution of the International Labour Organisation to examine the observance by Myanmar of the Forced Labour Convention No. 29, 1930,* in NORMLEX.

51 See W.R. Simpson, *The ILO and tripartism: some reflections*, in *Monthly Labor Review*, 1994, Vol. 117, No. 9, pp. 40-45.

52 See for example the CEACR observations on the measures to allevate the impact of economic crisis in Portugal in relation to the *Employment Policy Convention No. 122, 1964* – adopted 2013, Publisher 103rd ILC session, 2014.

53 International Labour Conference, 99th Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Office, Geneva, 2010.

54 See N. Bruun, J. Malmberg, *Lex Laval: Collective Actions and Posted Workers in Sweden*, in *Labour Law Between Change and Tradition*, *Liber Amicorum* Antoine Jacobs, R. Blanpain, F. Hendrickx (ed.), Alphen aan den Rijn: Kluwer, 2011, pp. 21-33.

in order to adjust the national system to the *Laval* decision[55]. The latter case was also examinated by the ECSR[56]. The *BALPA* case has resulted from the failure in collective bargaining between British Airways and the British Air Line Pilots' Association (BALPA) around the working conditions of workers of the subsidiary airlines that was to be introduced by British Airways between Paris and the US. When BALPA called for a collective action British Airways hold that the strike would be unlawful beceause it violate its freedom of enterprises. Due to the threat of claim for damages, estimated by the company at £100 milion per day, BALPA has cancelled the strike and failed a complaint to the CEACR. In its conclusions on the dispute the CEACR has voted against the application of the principle of proportionality to the right to take collective action. The CEACR has expressed the view that «the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention»[57]. The similar statement was delivered by both CEACR and ECSR in *Lex Laval* case concerning the restrictions of the right to organise and collective bargaining with the aim of regulating the working conditions of posted workers. The ECSR has found that any restrictions to those rights have to be evaluated from the point of view of article G of the ESC[58]. Concluding the violation of article 6§2, article 6§4, article 19§4a and the article 19§4b of ESC, the ECSR has emphasized that the freedom to provide cross-border services «constitutes an important and valuable economic freedom within the Framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers»[59].

As far as Spain "austerity" package is concerned the special attention was also placed by CFA on freedom of association and collective bargaining challenged by the Royal Legislative Decree No. 3/2012 of 10 Fe-

55 International Labour Conference, 102th Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Office, 2013, Geneva.

56 Collective complain of Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, No. 85/2012.

57 International Labour Conference, 102th Session, 2013, cit., p. 209.

58 That states that the rights and principles set forth in Part I may a subject of limitations and restrictions in the cases prescribed by law and if it is necessary in a democratic socjety for the protection of the rights and freedoms of others or for the protection of public ionterest, national security, public health, or morals.

59 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden…, cit., par. 122.

burary 2012 on urgent measures for labour market reform. The CFA has examinated the complaint of the Trade Union Confederation of Worker's Committees and the General Union of Workers on the grounds on violation the right to freedom of association and the right to bargain colectively. The complainants alleged that the Royal Legislative Decree has been drafted and promoted with no participation by or negotiation with the unions. In a final report CFA has requested the Spanish Government to be kept informed of developments on Spanish law, criticized the measures taken and proposed certain actions that should be taken at national level[60]. It has to be mentioned that the CFA has recommended the Spanish government to «draw the attention to the principles concerning consultation of the most representative worker's and employers' organisations with sufficient advance notice of draft laws»[61] that remain valid even at the time of crises.

The non binding nature of the ILO and ESC decisions is the main point of the critics of the effectiveness of the system of international instruments of protection of social rights[62]. There is extensive discussion on the due model of international labours standards[63], on the impact of international instruments on protection of social rights[64] and on the obstacles in the incorporation and effectiveness of international labour standards in national legal systems[65]. In this line some authors argue that applying sanctions is the best way to guarantee enforcement of international instruments[66].

The cases of violations of international labour standards reveal the difficulties that face Member States in its effective implementation. The experiences of ECJ decision in *Viking and Laval* case as well as cases on "austerity measures" reveal the huge discrepancy on how the relationship between social rights and economic freedoms is determined by the EU on the one hand and ILO and the Council of Europe on the other. As a

60 See Report No. 371, March 2014, NORMLEX.

61 *Ibidem*.

62 J. Servais, *Universal labor standards and national cultures*, in *Comp. lab. law pol. journ.*, 2004, Vol. 26, No. 1, pp. 35-54.

63 See A. Verma, G. Elman, *Labour Standards for a Fair Globalization for Workers of the World*, in *The Good Society*, 2007, Vol. 16, No. 2.

64 See X. Beaudonnet, *L'utilisation des sources universelles du droit international du travail par les juridictions internes*, in *Bulletin de droit comparé du travail et de la sécurité sociale* (Bordeaux), 2005, pp. 43–84.

65 See R. Filali Meknassi, *L'effectivité du droit du travail et l'aspiration au travail décent dans les pays en développement: une grille d'analyse*, Geneva, International Institute for Labour Studies, 2007.

66 G. Biffl, J. Isaak, *Globalisation and core labour standards: Compliance problems with ILO conventions 87 and 98. Comparing Australia and other English-speaking countries with EU Member States*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2005, Vol. 21, No. 3, pp. 405-444.

result, the closer link between EU action and the international standards of protection social rights has to be adopted. Otherwise the EU member States will still find themselves between a rock and a hard place. Unison plays an essential role in effective application of international instruments.

At the same time the system of suprvising of labour rights should take into account so-called "national context"[67]. This implies the wider use of the principle of proportionality in order to balance correctly rights concerned. We also believe that the whole supervisory mechanism of the ILO and the ESC might be strenghtened by making public information on claimes brought before these bodies and the measures taken by the member States in response to the recommendation.

3.3 European Court of Human Rights

Although the Court was created for the protection of political and civil rights, during the last 20 years the scope of social cases heard by the ECtHR is evidently enlarging in spite of criticism from the States and some scholars[68]. It is interesting to note that the largest number of "fundamental" for labour and social security law cases were heard during last 10 years when the globalization and the crisis have brought into question the implementation of many social rights. It can be presumed that the Court's willingness to deal with "social cases" is the response to the contemporary challenges faced by labour and social security rights[69].

Most of the claims on austerity measures were either hold inadmissible or the violation was not found[70]. However, this tendency does not mean that

67 See A. Dasgupta, *Labour Standards and WTO: A New Form of Protectionism*, in *South Asian Economic Journal,* 2002, Vol. 1, No. 2, pp. 113-129.

68 See the article of the President of the Russian Constitutional Court: V. Zorkin, *The limits of pliability* (Predel ustupchivosti), Rossiysskaya Gazeta, 29 October 2010, available at http://www.rg.ru/2010/10/29/zorkin.html (2014-10-07) or L. Hoffmann, *The universality of human rights*. *Judicial Studies Board Annual Lecture*, 19 March 2009, par. 22; L. Bojin, *Challenges facing the European Court of Human Rights: Fragmentation of the international order, division in Europe and the right to individual petition,* in *The European Court of Human Rights and its Discontents: Turning Criticism*, edited by Spyridōn I. Phlogaitēs, Tom Zwart, Julie Fraser, Edward Elgar Publishing, 2013, p. 60; M. Bossuyt, *Should the Strasbourg Court Exercise More Self-Restraint?On the extension of the jurisdiction of the European Court of Human Rights to social security regulations*, in *Human Rights Law Journal*, Vol. 28, n. 9-12, 2007, pp. 321-332.

69 This opinion was confirmed by some judges of the ECtHR, see *Implementing the European Convention on Human Rights in times of economic crisis*, materials of the seminar, held in ECtHR on 25 January 2013, available at: http://www.echr.coe.int/Documents/Dialogue_2013_ENG.pdf (accessed 20 october 2014).

70 ECtHR, 07 May 2013, case No. 57665/12, 57657/12, *Koufaki and Adedy v. Greece*; ECtHR, 02 February 2012, case No. 44232/11, 44605/11, *Mihăieş and Senteş v. Romania*;

the Court is unwilling to protect social rights in the era of crisis, analysis of earlier social security cases make us understand that the Court's approach to this matter was always very rigorous for the applicant. The States were always granted a wide margin of appreciation[71] in establishing the system of social security and in regulating the sums of particular pensions or allowances[72].

We can presume that the Court in general admits reduction of social security benefits or other deterioration in the level of social rights[73] if it is dictated by austerity measures as the *aim* to overcome economic hardships is found to be a legitimate one. However, the margin of appreciation enjoyed by States in these particular fields is not unlimited[74]. The Court's attention in such cases is focused on proportionality of the State's interference to the aim pursued.

The test of proportionality is the key to understanding the Court's approach both to austerity measures and to re-balancing of social rights and economic freedom[75]. The research of the Court's case-law shows that the burden is very rarely considered to be excessive. Leaving apart cases concerning termination of payments of social security benefits[76] there are only several cases where the reductions of pensions or salaries are found to be disproportionate and excessive.

ECtHR, 08 October 2013, case No. 62235/12, 57725/12, *Da ConceiçãoMateus v. Portugal and Santos Januário v. Portugal*; ECtHR, 20 March 2012, case No. 13902/11, *Panfile v. Romania*; ECtHR, 19 June 2012, case No. 17767/08, *Khoniakina v. Georgia*.

71 About the margin of appreciation of the states see, for example, G. Letsas, *A theory of interpretation of the European Convention on Human Rights*, Oxford University Press, 2007, pp. 80-98.

72 In the area of pensions and welfare benefits see for ex. ECtHR, 25 October 2011, case No. 2033/04 et all., *Valkov and others v. Bulgaria*, para.91; EctHR, 15 June 1999, case No. 34610/97, *Domalewski v. Poland*.

73 See for ex. recent case ECtHR, 20 May 2014, case No. 4241/12, *McDonald v. The United Kingdom*, concerning the night care of disabled person.

74 ECtHR, 08 October 2013, case No. 62235/12, 57725/12, *Da Conceição Mateus and Santos Januário v. Portugal*, par. 23.

75 See ECtHR, 02 July 2013, case No. 41838/11, *R.Sz. v. Hungary*; ECtHR, 23 September 2014, case No. 22193/11, 18229/11, *Á.A. v. Hungary, P.G. v. Hungary*. See more on proportionality in S. Greer, *"Balancing" and the European Court Of Human Rights: A Contribution To The Habermas-Alexy Debate*, in *Cambridge Law Journal*, July 2004, 63(2), pp. 415- 417 and B. Caruso, *New Trajectories of Labour Law In the European Crisis. The Italian Case*, in *Comp. lab. law pol. journ.*, 2015, issue 2, available at: http://www.labourlawresearch.net/papers/new-trajectories-labour-law-european-crisis-italian-case (2014-09-20)

76 Due to revealed mistakes in appointment, see ECtHR, 02 October 2012, case No. 38459/03, *Lewandowski v. Poland*, or legislative changes, see: ECtHR, 13 December 2011, case No. 27458/06, 37205/06, 37207/06, 33604/07, *Lakicevic and others v. Montenegro and Serbia* ECtHR, 15 April 2014, case No. 21838/10, 21849/10, 21852/10 et al., *Stefanetti and Others v. Italy*.

In these cases, namely, R.Sz. v. Hungary (where the taxation on the rate 98% was found to violate the Convention) and Stefanetti and Others v. Italy (where the reduction of pension 67% was considered as a violation), the Court focused mainly on the per cent of reduction. Comparing these cases with similar ones, N.K.M. v. Hungary,[77] where the taxation on the rate 52% was found to violate the Convention, or Maggio and others v. Italy,[78] where the reduction of pension less than 50% was not considered as a violation, and taking into account the Court's conclusions in other "austerity" cases[79], we can attempt to reveal a "quantitative" threshold of deterioration of social rights in austerity.

We can presume that this border is about 50% of salary or social security benefit, therefore the margin of appreciation of the State in these cases is in fact very wide. A"qualitative" approach to the estimation of austerity measures can be found in Larioshina v. Russia[80] and Budina v. Russia.[81] In these cases the Court stated that wholly insufficient amount of pension and social benefits may raise an issue under Article 3 of the Convention (prohibition of inhuman or degrading treatment), therefore the effect of austerity measures might be estimated from this point of view.

According to the Court's case-law degrading treatment violates art. 3 if it attains a "minimum level of severity". This threshold is reached where ill-treatment involves actual bodily injury or intense physical or mental suffering, or humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity[82]. The fact that both of claims were hold inadmissible shows that the Court rigorously evaluates the applicants' suffering in such "social security" cases.

In both cases the Court found the applications inadmissible, although in the sum of pension was about 15 euro in Larioshina case, and about 50 euro in the case of Budina. The Court noted that the applicants did not provide evidence that the amount of the pension has caused damage to physical or mental health. Therefore, a "qualitative" approach of the Court to social security matters is much stricter than "quantitative" one and

77 ECt, 14 May 2013, case No. 66529/11, *N.K.M. v. Hungary*.

78 ECtHR, 31 May 2011, case No. 46286/09, 52851/08, 53727/08, 54486/08, 56001/08, *Maggio and others v. Italy*, was found only the violation of art. 6 as Italian Law 296/2006 excluded pension treatments and settled retrospectively the terms of the disputes before the ordinary courts.

79 See *supra*, notes 21 and 19.

80 ECtHR, 23 April 2002, case No. 56869/00, *Larioshina v. Russia*, inadmissible.

81 ECtHR, 18 June 2009, case No. 45603/05, *Budina v. Russia*, inadmissible.

82 ECtHR, 10 July 2001, case No. 33394/96, *Price v. The UK*; ECtHR, 16 December 1999, case No. 24888/94, *V. v. The UK*; ECtHR, 28 January 2014, case No. 26608/11,*T.M. and C.M. v. The Republic of Moldova*, par. 35.

leaves little hope to individual applicant suffering from austerity measures.

The Court's support of trade unions rights is a more evident contribution to the protection of social rights. The research of development of the legal positions of the Court on the right of association (art. 11) shows that the Court emphasizes the necessity of effective protection of rights for collective bargaining and the rights to strike. In famous judgments Demir and Baykara and EnerjiYapi-YolSen v. Turkey the Court, basing largely on provisions of ILO Convention and European Social Charter, acknowledged the fundamental status of these rights. Thus the Court to some extent opposed ECJ decisions in Laval and Viking[83].

Although two years have passed since the Grand Chamber hearing of Demir and Baykara case it is very difficult to estimate the effect of these decisions on the protection of trade union rights in the countries of Council of Europe. At least we can say that the provisions of Turkish legislation still restrict the right for collective bargaining of municipal servants[84]. Therefore, we are likely to agree with Ewing and Hendy, who noted that «great legal triumphs can produce such little progress»[85].

However, even little progress is still a very important and encouraging result. The conclusion on fundamentality of the right for collective bargaining attaches more weight to this right. This "additional weight" must be taken into account by national courts in balancing the right for collective bargaining or the right to strike with economic freedoms.

The Court's estimation of austerity measures as interference with the rights under Convention is another valuable conclusion. It might provide domestic courts a new vision of such cases, demonstrate the possibility of consideration of austerity measures in the light of fundamental human rights. National courts might be more rigorous in the estimation of the proportionality of the interference with social rights, might notice details which are imperceptible from Strasburg. It is remarkable that this ap-

83 There is extensive literature comparing Laval and Viking decisions of the ECJ and the ECtHR's approach to collective bargaining and right to strike, see F. Dorssemont, *A judicial pathway to overcome Laval and Viking*, in *European Social Observatory*, 2011, 5, pp.13-15, or A. Ludlow, *The right to strike: a jurisprudential gulf between the CJEIJ and EctHR*, in *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR*, edited by K. Dzehtsiarou, T. Konstadinides, T. Lock, N. O'Meara. Routledge, 2014, p. 128.

84 *Jointreport "Trade union rights situation in Turkey"*, presented on the 32th meeting of the EU-Turkey Joint Consultative Committee on the 7-8th of November 2013, available at: http://www.eesc.europa.eu (2014-06-19).

85 K.D. Ewing, J. Hendy,*The Dramatic Implications of* Demir and Baykara, in *Ind. law journ.*, 2010, V.39, Issue 1, pp. 2-51.

proach was already used by Estonian Supreme Court[86], Latvian[87] and Portuguese[88], Italian and Ukrainian Constitutional Courts in estimating pension cuts as unconstitutional. We would hopefully note that this tendency can be spread to other countries as well.

4 Conclusions

Our research has posed a very difficult question – whether international instruments play an important role in the effective protection of social rights, are they capable to go beyond what is commonly called "mobilization of shame"?

The reluctance of the European Court of human rights to resist austerity measures in a broader way and non-binding *status* of the decisions of other international bodies make us doubt in the possibility of effective international response to deregulation. Their contribution is different. As it was shown above, the decisions of the International bodies have become the source of inspiration and support for national courts. Re-balancing is an inevitable process under present economic conditions. But it must be guided by the "principle of proportionality" – as a hinge of reasonable communication between urgency of the measures and reasonableness and proportionality of their impact on rights.

National courts must be equipped with this principle, developed in the case law of the ECtHR, and as they are "better placed" than international bodies, analyse carefully new legislation through the lens of the legal position of these bodies.

86 On the 26 June 2014 the Estonian Supreme Court declared the cuts in judges' pensions during the austerity period unconstitutional, see Representing Retired Estonian Judges in Challenge to Austerity Measures. Available (accessed 20 October 2014)

87 See Judgment Of The Constitutional Court Of Latvia, 21 December 2009, in the case No. 2009-43-01 that held unconstitutional the reductions of pensions, referring on the judgement of the ECtHR and to the General comments of the ICESCR.

88 See the Constitutional Court Decision No. 353/2012, that declared unconstitutional the provisions of Budget See Judgment of the Constitutional Court of Ukraine, 3.06.2013, No. 3-рп/2013, that held unconstitutional the reduction of pensions to retired judges, the document is available in Russian at: `http://ccu.gov.ua/ru/doccatalog/list?currDir=196048` (2014-10-20).