Some considerations on the European Social Charter

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It was an honour for me to be a member of the European Committee of Social Rights from 2015 to 2020, six exciting years, undoubtedly one of the most interesting experiences of my professional life. In addition, I had to live through difficult times for social rights due to the aftermath of the economic crisis which, when I joined the Committee, was just beginning to be overcome. I had the impression that our Committee was the last bastion of defence against a retreat of the social state which could have led, and in a way did lead, to a crisis of democracy itself, because the European model of social welfare, which Hermann Heller called the social state and which became widespread in Western Europe after the Second World War, had been put at risk.

Faced with the traumatic annulment of human dignity that the totalitarianisms of the 20th century brought with them, the liberal foundations of the constitutional state were reactivated and completed with the social pillar that had only appeared experimentally in the first third of the 20th century. The resulting compromise was the social state, because in the eyes of that generation it was necessary to add to the individual freedom to do as we please the guarantee of minimum living conditions that would prevent our very free will from decaying into what the French writer Anatole France called "the freedom to sleep under bridges". So, in addition to legal freedom, we had to add the physical freedom that only the state, it was thought, could guarantee.

The reaction also reached international law, which has been forever changed since the 1948 United Nations Declaration of Human Rights, whose proclaimed rights have been formalised in the international treaties recognising them, the first of which was the 1950 European Convention on Human Rights. Hans Kelsen's dream of seeing international subjective rights defended by international courts became a reality.

A true constitutionalisation of international law thus took place, the consequence of which, also in legal terms, was to enable individuals to claim their rights recognised in such treaties before international courts. For the first time, states were no longer the sole subjects of public international law.

And it was only logical that, since the social state had been constitutionalised, public international law should also incorporate social elements in international treaties. In addition to the treaties of the International Labour Organisation, the European Social Charter of 1961 was a real milestone reflecting this constitutionalisation. The end result was, on the one hand, treaties proclaiming civil rights and, on the other, those recognising social rights, the latter focusing on the world of work, an activity then considered central to human life.

Parallel to this phenomenon of constitutionalisation of international law, briefly described above, there has been an opening up of constitutional law to international human rights law, which has become a canon, a common place and a point of reference for States which, by ratifying such treaties, have undertaken to respect the rights enshrined in them. This openness has reached such a degree that certain legal systems, in an interesting symbiosis, especially in Latin America, acknowledge a constitutional level to treaties on rights.

Although the originating text of the trend described above, the Universal Declaration of 1948, recognises both civil and political rights and social rights, the treaties that developed it presented both types of rights separately: in the framework of the United Nations, the respective 1966 Covenants on Civil Rights and on Social Rights; in the Council of Europe, the European Convention on Human Rights (ECHR) and the European Social Charter (ESC). Only the 1969 American Convention on Human Rights follows the unifying wake of the Universal Declaration, since the 1988 Protocol of San Salvador on social rights is an addition to the 1969 Convention.

Thus, although there is constant talk in international law of the indivisibility of rights, presenting them as two inseparable branches, in fact there is a clear normative separation and, what is more relevant, the protection mechanisms, which, as the Council of Europe demonstrates, are quite different, are not put on an equal footing, since the protection of civil rights is entrusted to a court, the ECtHR, while social rights are entrusted to a committee, the European Committee of Social Rights (ECSR), which has a very different and notoriously inferior status to that of the Court, not to mention that the ECSR is not accessible to individuals in defence of the rights recognised by the ESC, in contrast to the access individuals do have before the ECtHR.

Nor do European Constitutions tend to equate all social rights with civil rights at the state level, resulting in a different status for civil and for social rights. Civil rights are fundamental, while social rights, with some notable exceptions, are based in law, which weakens the notion of indivisibility between civil and social rights at the constitutional level, as is the case at the international level. While civil rights recognised in international law are mirrored in the constitutional framework, social rights, with some exceptions, are not mirrored in the same way, because social rights are stipulated in national law, not in the constitution. This paradox nurtures the frequent undervaluing of social rights and makes their protection difficult.

Curiously, almost without exception, the opposite is true in the Latin American constitutional laboratory, given that social rights have generous constitutional recognition, confirming the indivisibility between the two groups of rights. A different matter is that, in practice, Latin American social states are much weaker than the European ones.

At the international level, the relative weakness of social rights is to some extent explained by the fact that the international bodies for their defence are not courts and are not always accessible to individuals, and that, at the state level, they lack constitutional status. This also

applies to European Union law. There is a specific competence in social matters in Title X, the leading provision of which, Article 151, mentions social rights "such as those set out in the European Social Charter signed at Turin on 18 October 1961". For its part, and this is worth emphasising, the Charter of Fundamental Rights of the European Union (CFREU) mirrors the 19 rights proclaimed in the European Social Charter of 1961. However, it does not say for the latter what Article 52(3) of the CFREU states for the ECHR equivalents: that those in the Charter of the Union shall have the same scope as they have in the European Convention. It would have been logical, from the point of view of indivisibility, that the mirroring of the rights proclaimed in the ESC would justify treating them in the same way as those of the ECHR. This is not done, nor is there any provision in respect of the ESC for what Article 6.2 of the Treaty on European Union requires of the Union: its accession to the ECHR, although this mandate has not been fulfilled to date.

In short, despite the mirroring in the CFREU of the rights of both the ECHR and the ESC, they are not treated in the same way and the indivisibility which stems from recognising both in the same document is partly contradicted by the different way in which EU law relates to their respective main sources, i.e. the ECHR and the ESC.

None of the above has prevented the ECSR from indirectly judging the social policies inspired by the Union when it has monitored the acts of the States that implemented them; and in these cases, especially those related to the economic crisis that began in 2008, the ECSR has not been particularly deferential and has ultimately asserted the rights of the ESC in the face of Community guidelines.

What could be improved in the functioning of the European Social Charter? For a start, taking social rights seriously means giving the body responsible for defending them the means to do so. The ECSR is notoriously under-resourced and the success of its mission to protect social rights requires more material support.

On the political level, it seems to me that while there is a broad consensus on the protection of ECHR rights, the social policies required to satisfy ESC rights are the subject of controversy between positions more in favour of the intervention of the public authorities to ensure the minimum living conditions that derive from social rights, and other points of view that link social welfare to the unimpeded evolution of the market, disrupted by such public policies. To the extent that the latter view gains ground, social rights could be compromised.

On the other hand, the ESC, even in its 1996 revised version, revolves around work and many of the rights recognised in it are related to the world of work. And as we know, recent proposals aim to sideline work by replacing the income it brought to the worker with an unconditional universal income. Although this uncertain road has not been travelled, the truth is that other types of social rights have appeared, particularly in the Latin American constitutional laboratory, but not only there. Think, for example, of environmental rights. The ESC is therefore somewhat outdated and could perhaps be completed and modernised. In the meantime, the ECSR will continue to carry out an evolutive interpretation that updates the Charter and broadens the spheres of life to which its provisions apply.

And in relation to protection procedures, it must be acknowledged that a certain degree of defencelessness arises when the holders of the rights recognised in the ESC cannot access the body responsible for their protection, i.e. the ECSR. As it has been traditionally held, the essence of a subjective right is that its holder can activate the legal system to protect it, with

the procedural legitimation to set the courts into motion. This is the case for ECHR rights, but not for ESC rights because, beyond the reporting procedure, the collective complaints procedure is only open to the initiative of trade unions, employers' organisations and NGOs. In other words, the defence of rights is always vicarious, through an interposed legal person, which means that individuals can only assert ESC rights before national courts, not before an international body.

This contrasts with what has been happening in recent years within the framework of the United Nations with the individual complaints procedure before the Committee on Economic, Social and Cultural Rights (Optional Protocol to the 1966 Covenant on Economic, Social and Cultural Rights, adopted in 2008). According to the 2008 Protocol, anyone can, after exhausting domestic judicial remedies, submit a complaint to the Committee on Economic, Social and Cultural Rights. Although the Committee is not strictly speaking a court, it examines individual complaints, but only in a subsidiary role, i.e. once the States have had the opportunity to remedy any infringement of the social right invoked.

It must be admitted, however, that the collective complaints procedure has an extraordinary immediacy because those entitled to bring it can do so, for example, as soon as a law is passed which they consider to be prejudicial to a social right proclaimed in the Charter. But it is precisely this operability, which is completely alien to the subsidiarity that inspires the individualised international protection of human rights, which, in my opinion, explains how reluctant States, whatever the political persuasion of their governments, have been to accept being subjected to this expeditious control. In its advantage lies at the same time its weakness.

Personally, I would perhaps prefer a type of individual access mechanism, similar to the UN system explained above. I must admit, however, that the kind of abstract control of the conventionality of norms and situations that the collective complaints procedure provides for has been of great interest to me as a constitutionalist and member of the Committee, and it has been the most enjoyable task I have carried out over these years.

The last lines are to highlight the rigour and dedication with which the members of the ECSR and its staff, lawyers and other members of the team, carry out their arduous task. To all of them I wish to express my gratitude.