Employment disputes and the European Social Charter

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I. Introduction[1].

Since 2012, the economic crisis has led to significant changes in Spanish legislation on social rights and on human rights in general. It has to be said that the majority of the reforms introduced fail to comply with the provisions of the European Social Charter.

I wish here to emphasise the current need to be aware of this treaty, with a view to invoking it directly in the domestic courts, thereby ensuring compliance with rights that are being breached. This would be in accordance with the principle of "constitutional oversight" embodied in the 1978 Spanish Constitution, Act 25/2014 of 27 November on treaties and other international agreements, and the rules laid down in the Vienna Convention on the law of treaties of 23 May 1969 (see, *inter alia,* Article 27 on Internal law and observance of treaties: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

I have divided this contribution into three parts:

- The first will consider the numerous changes to Spanish legislation and the "recommendations" – I place the word in inverted commas – of the institutions of the European Union, particularly the Troika and the European adjustment programmes[2].

- In the second, I will first describe the general situation in my country *vis-à-vis* the European Social Charter (hereafter the ESC) and its protocols, and will then consider the various judicial resources used by trade unions, opposition political parties, governments of autonomous communities and ordinary citizens to protect violated rights.

- Finally, in the third and final part, I will assess the effectiveness of the ESC in this regard, since in recent times it has become the most important and, above all, the most effective treaty for safeguarding social rights in response to austerity measures that that since 2013 have failed to abide by international undertakings.

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[1]Written version of my contribution to the conference on "Social rights in today's Europe: the role of domestic and European Courts", held in Nicosia on 24 February 2017 under the auspices of the Supreme Court of Cyprus and the Council of Europe as part of the Cypriot Chairmanship of the Council of Europe's Committee of Ministers.

[2] For a presentation of all these measures, see Salcedo Beltrán, C., "Crisis económica, medidas laborales y vulneración de la Carta Social Europea", *Revista Europea de Derechos Fundamentales,* 2013, no. 22, pp. 81-136.

II. The economic crisis and changes to legislation

I will first consider the numerous changes to legislation introduced by the Spanish government since 2012, which are hotly disputed since they have resulted in a significant decline in hitherto recognised human rights. Most of these changes result from the conditions imposed by the European Union in exchange for the financial assistance provided to deal with the critical state of the banking sector's financial structure, involving both a housing bubble and a credit crisis.

It was very easy to enact these reforms because the right wing People's Party had an absolute majority in the Congress of Deputies (the lower house) in the last parliamentary session. This enabled it to issue royal legislative decrees in the event of special and urgent need. These accounted for almost 34% of all legislative initiatives – a record – and were approved by the Constitutional Court, with three judges dissenting, on the grounds that they were justified by the severe economic crisis, the public budget deficit and so on (see, *inter alia,* decrees 12/2015 of 15 February, 81/2015 of 30 April or 95/2015 of 14 May[3])[4].

The following are the main changes effected that have had a detrimental effect on social rights:

a) Compensation paid for unfair dismissal has been reduced, from 45 days per year worked up to a limit of 42 months, whatever the number of years worked by the employee, to 33 days up to a limit of 24 months.

b) Collective redundancy procedures have been reformed to make it easier for employers to apply them, for example the possible grounds include a significant decline in orders or turnover.

c) Absenteeism, even when justified, has become a ground for dismissal.

d) A new "employment support" contract of indefinite duration has been established, relating to full or part-time work. In general, the applicable arrangements are those laid down in the so-called Workers' Statute (*Estatuto de los Trabajadores*[5]) and collective agreements relating to ordinary non-fixed-term contracts, with the exception, however, of the length of the trial period (section 4.3 of Act 3/2012 of 6 July)[6]. This is the most controversial aspect because it establishes a trial period of one

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[3] See, *inter alia*, García Majado, P., "El presupuesto habilitante del Decreto-Ley ante la crisis económica", *Revista de derecho constitucional europeo*, 2016, no. 25, p. 2 pp. http://www.ugr.es/~redce/REDCE25/articulos/06_MAJADO.htm

[4] The government no longer has this majority and governs with the support of the centre party Ciudadanos, with a majority of PSOE (left wing) members of parliament abstaining.

[5] Royal Legislative Decree 2/2015 of 23 October 2015, which approved the *Texto Refundido de la Ley del Estatuto de los Trabajadores*.

[6] See, *inter alia*, Salcedo Beltrán, C., "Carta Social Europea. Instrumento para la defensa en el ámbito nacional de los derechos sociales". Fundación Primero de Mayo, Rapport no. 60, 2013, pp. 1-23 (http://www.1mayo.ccoo.es/nova/files/1018/Informe60.pdf) and "El contrato de apoyo a emprendedores: su difícil encaje en la normativa internacional, europea y nacional". *Revista de Derecho Social*, 2013, no. 62, pp. 93-128. It is presented as a flagship contract, whose purpose, as set down in Act 3/2012, is to "facilitate stable employment while at the same time encouraging entrepreneurial initiative".

year, irrespective of the job or post concerned and the employee's previous experience. Legal theory offers few grounds for optimism, since the unlimited duration aspects of the contract are counteracted by the introduction of a one-year trial period, which effectively transforms it into a temporary contract with no justification or a one-year contract whose holder can be freely dismissed without compensation[7].

e) There have been numerous changes concerning collective agreements and bargaining rights. These include giving priority to plant and enterprise-based agreements, a maximum deadline for collective agreements currently in force, and much greater freedom for employers to change employment and working conditions. In addition, there have been changes to the classification of employees in collective agreements. Previously this was by categories and is now by occupational groups, which enables employers to require employees to carry out different duties or fill different positions within the same undertaking and, more importantly, authorises them to decide, unilaterally, not to apply working conditions previously agreed with employee representatives in freely negotiated collective agreements at enterprise level. Briefly, employers can now lawfully ignore or dismiss the subject matter of collective agreements and unilaterally waive the provisions of such freely negotiated agreements.

f) The Government is now authorised, in exceptional circumstances, to order a return to work and compulsory arbitration, having regard to the length or consequences of a strike, the attitude of the parties and the severity of the threat posed to the rights and freedoms of others and to the national economy.

g) The most representative trade unions and employers' organisations are not consulted.

h) Under Royal Legislative Decree 16/2012 of 20 April on urgent measures to ensure the viability of the national health system and improve the quality and security of services, foreign nationals in the country unlawfully are now denied access to health care under the national health system, other than in "special circumstances". The decree amends Institutional Act 4/2000 of 11 January on the rights and freedoms of foreign nationals in Spain and their social integration and Act 16/2003 of 28 May on the cohesiveness and quality of the national health system, and adds a new Section 3ter on medical assistance in special circumstances: emergencies resulting from serious illnesses or accidents; assistance to pregnant women, before and after childbirth; foreign minors aged under 18. Under Royal Decree 576/2013 of 26 July, there is now a charge of between 60 and 157 Euros per month.

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[7] See, *inter alia,* Vicente Palacio, A.: "El Real Decreto-Ley 3/2012, de 10 de febrero, de Medidas Urgentes para la reforma del mercado laboral (Una breve presentación de la reforma en el ámbito del Derecho Individual)". *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2012, no. 31 (extraído de www.iustel.com/v2/revistas/, p. 266. Preciado Doménech, C.H.: *Una primera aproximación al RDL 3/2012, de reforma laboral*. Albacete, 2012. ¿Hacia dónde va el Derecho del Trabajo? Análisis de la Ley 3/2012, de 6 de julio, de medidas urgentes de reforma del mercado laboral. *RevistaJurídica de Cataluña*, 2012, no. 3, p. 37.

i) The method of calculating rises in pensions has been altered so that it no longer takes account of inflation but is now based on a system that offers the Government a wide margin of discretion that will result in a reduction in purchasing power, including the introduction of a sustainability factor for all new retired persons, indexing benefit levels to life expectancy and the country's growth rate, changes to the legal age of entitlement to retire and so on (Royal Legislative Decree 28/2012 of 30 November on measures to strengthen and safeguard the social security system, Act 23/2013 of 23 December, which establishes the arrangements governing the sustainability factor and the index for uprating social security pensions)[8].

Most of these reforms are incompatible with Spain's commitments under the international conventions it has ratified, including the ESC. In the years following the reforms, the country has been criticised by the European Committee of Social Rights (hereafter the CEDS), under its reporting system, for non-compliance with the ESC.

III. Spain and the European Social Charter

To understand the implications of the previous paragraph, it should be noted that Spain has ratified the 1961 Charter and has accepted all its provisions[9]. It is therefore bound by the rights and safeguards enshrined in it, as well as by the interpretations of the CEDS. It has also signed and ratified the 1988[10] and 1991[11] protocols.

On the other hand, it has not ratified either the 1995 collective complaints protocol or the revised version of the ESC, which means that the former cannot be used to challenge infringements of rights embodied in the latter. It is therefore required to recognise and comply with the rights and safeguards embodied in the nineteen articles of the Charter, the four rights of the 1998 Protocol and, very importantly, the interpretations of the CEDS adopted under the reporting system and, if the article concerned is one of the twenty-three that Spain has ratified, under the collective complaints procedure.

There have been many criticisms of the failure to ratify the revised Charter[12], given the fact that there are no legal obstacles to this, as the Spanish Council of State has stated[13]. The failure to ratify the revised Charter is also illogical, since the same rights

[8] On 14 March 2017 the Congress of Deputies, sitting in plenary session, approved a non-legislative motion calling on the Government to repeal Act 23/2013, see http://www.congreso.es/backoffice_doc/atp/orden_dia/pleno_035_14032017.pdf

[9] Instrument of ratification of 29 April 1980 (official bulletin (BOE) of 26 June 1980).

[10] Signed on 5 May 1998 and ratified on 24 January 2000 (BOE of 25 April).

[11] Signed on 21 October 1991 and ratified on 24 January 2000 (BOE of 25 April).

[12] See, among other authors, Brillat, R.: "La Charte Sociale et son acceptation progressive par les États". *Revista Europea de Derechos Fundamentales*, 2009, no. 13. p. 231.

[13] In its opinion of 11 May 2000 (No. 1740/2000) on the revised Social Charter, the Council of State stated that "in principle, its application in our country does not pose any problems, since it is compatible with our domestic law and its ratification would not therefore entail any changes to our legislation". However, it also pointed to "a certain reluctance among member states, particularly those belonging to the European Union, to ratify this treaty, even though the majority of them have signed it. This simply reflects the inclusion in the treaty in force of more obligations and their interpretation, including their

are embodied in the European Union's Charter of Fundamental Rights, to which Spain has been bound since the Lisbon Treaty came into force on 1 December 2009[14].

I wish to stress that even though the available enforcement machinery is less powerful than it is in countries that have accepted the collective complaints procedure, the applicability of the ESC in my country and the binding force of CEDS interpretations and resolutions, whether through the reporting procedure or following presentation of collective complaints by the social partners of other contracting parties, should not be underestimated, given their value as precedents. Thus, the only effect of non-ratification of the 1995 Protocol is that it is not possible to take cases directly to the CEDS for a ruling on a possible failure to apply the Charter. However, if any article considered by the Committee has been ratified by Spain, the relevant situation, whether this relates to legislation or practice, and any decisions and resolutions adopted, may be invoked in Spain.

IV. The effectiveness of the safeguards of the European Social Charter and the case-law of the European Committee of Social Rights in response to the austerity measures

Despite the fact that, as noted above, the revised Charter is not applicable in Spain, it can be argued that it is the country where the most progress has been made in securing the direct application of the treaty and of the case-law of its supervisory body.

Achieving this outcome has been an extremely complicated task. First, the Charter has faced the same problems as in most of the Council of Europe countries, in particular the fact that it is not well known and is not considered to be binding or to have direct effect, that there is confusion about the respective roles of European Union law and the Council of Europe's regulatory system, that CEDS conclusions and decisions on the merits do not constitute case-law in the strict sense or interpretations that have to be complied with, thereby confining the notion of case-law to bodies that are designated as "courts" and whose decisions are termed "judgments", and finally that the

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scope, by the Committee of Independent Experts". Jimena Quesada considers that this reluctance of EU members derives from the possibility that the Court of Justice of the European Union and the European Committee of Social Rights might reach different conclusions and that there is no mechanism for resolving the matter at European level (just as is the case when there are similar disputes before the Luxembourg and Strasbourg courts), with the result that the domestic courts would end up with a dilemma that was difficult to resolve. If such a situation did arise, and if the EU's approach were the most advantageous for social rights, this would not be a problem from the standpoint of the European Social Charter, since the latter contains a minimum standard clause that allows for higher standards under other supranational or national legislation. However a more complex situation might ensue if the Council of Europe's approach were to be more favourable, mainly due to the strong influence of the principles of the primacy and direct effect of European Community law. The ideal solution would be ratification of the European Social Charter by the European Union. *La jurisprudencia del Comité Europeo de Derechos Sociales*. Valencia, 2007, Tirant lo Blanch p. 24 ff and "La factibilidad de los derechos sociales en Europa: debate actual y perspectivas", *Estudios de Economía Aplicada*, 2009, vol. 27-3 (http://revista-eea.net/volumen.php?Id=70&vol=27&ref=3), pp. 755 and 756.

[14] Instrument of ratification published in the BOE on 27 November 2009.

European Convention on and Court of Human Rights are seen to take precedence over the Charter.

Moreover, there is the problem in Spain of the languages – English and French – in which the case-law of the CEDS is published. This creates an additional problem for lawyers, judges, trade unions and non-governmental organisations that cannot be ignored and impedes its implementation.

It should also be added that in response to challenges in the Constitutional Court, the latter has ruled that all the reforms are constitutional (judgments 119/2014 of 16 July, 8/2015 of 22 January, 49/2015 of 5 March, 95/2015 of 14 May, 140/2015 of 22 June, 139/2016 of 21 July)[15].

Nevertheless, a fundamental role has been played by the lower courts, particularly those of first and second instance, where reliance on convention compliance with regard to the Charter and the case-law of the CEDS has helped to secure Charter rights.

These developments have been led by legal professionals in all areas, relying on the direct application of the treaty and drawing on and applying certain fundamental principles such as:

1. The hierarchical relationship between international and domestic law (articles 1 of the Civil Code and 9.3 of the Spanish Constitution).

2. Reviews of convention compliance and the significant way in which they differ from constitutional review[16]. They are made possible by, first, Article 96 of the Spanish Constitution, which provides that validly concluded international treaties, once officially published, shall be part of the domestic legal system and, second, Article 10.2 of the Constitution, which provides that "Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain". Both are further clarified in Act 25/2014 of 27 November on treaties and other international conventions (sections 29 and 31: "In the event of conflict, the legal provisions of validly concluded international treaties, once officially published, shall take precedence over other domestic provisions, other than constitutional provisions".)

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[15]See Jimena Quesada, L., "Impacto práctico de la jurisprudencia del Comité Europeo de Derechos Sociales", Address to the 27th Catalonian employment law days in Barcelona, "In memoriam Professor M.R. Alarcón", 17-18 March 2016, file:///D:/Downloads/JimenaQuesadaLuis.pdf

[16] Review of convention compliance can be defined quite simply with reference to the question posed by Jimena Quesada, namely whether an ordinary court can refuse to apply domestic, non-constitutional, legislation in force if the latter is incompatible with an international treaty that has been lawfully incorporated into the domestic legal system, or indeed with the interpretation of the supreme supervisory body specified in the treaty. In the case of Spain the answer is clearly "yes" since, in accordance with the aforementioned constitutional provisions, it is possible to rule that a domestic legal provision is invalid because it is incompatible with an international treaty or with how its supervisory body interprets it. See *Jurisdicción nacional y control de convencionalidad. A propósito del diálogo judicial global y de la tutela multinivel de derecho*. Navarra, 2013, pp. 24 and 25.

3. The absence of any hierarchy between alternative sources of international law, which means that the differences in the legislative channels through which European Union law and Council of Europe law have been incorporated into the overall domestic legal structure do not entail any differences in their binding force. They represent two legal systems and the principles, rules and obligations constituting EU law do not necessarily coincide with the system of values, principles and rights embodied in the Charter (*Laval* case, decision on the merits of 3 July 2013, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012).

The results of this approach have been very positive. They finally started to become apparent at first instance in November 2013, and at second instance in January 2016. The direct and binding effect of the ESC and the case-law of the CEDS have been established with regard to three subjects:

1. The one-year trial period for employment support contracts.

2. The revocation of the pensions uprating.

3. Treating on-call periods as time actually worked.

1. The one-year trial period for employment support contracts.

Following the Government's introduction of a one-year trial period in February 2012, the courts have ruled on this subject in connection with the termination of employment contracts during the period in question. In response to allegations of violations of Article 4.4 of the ESC and following the Committee's decision on the merits of 23 May 2012, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 65/2011, the courts have ruled that the length of the impugned trial period was in breach of this international treaty.

Judgments at first instance:

Employment court no. 2, Barcelona, judgment no. 412 of 19 November 2013
Employment court no. 1, Tarragona, judgment no. 179 of 2 April 2014
Employment court no. 1, Mataró, judgment no. 144 of 29 April 2014
Employment court no. 3, Barcelona, judgment no. 352 of 5 November 2014
Employment court no. 19, Barcelona, judgment no. 491 of 17 November 2014
Employment court no. 1, Toledo, judgment no. 667 of 27 November 2014
Employment court no. 9, Grand Canaria, judgment no. 705 of 31 March 2015
Employment court no. 2, Fuerteventura, judgment no. 58 of 31 March 2015
Employment court no. 1, Toledo, judgment no. 202 of 9 April 2015
Employment court no. 1, Las Palmas, judgment no. 74 of 11 May 2015
Employment court no. 1, Las Palmas, judgment no. 896 of 3 June 2015

Judgments at second instance:

Judgment of the Canary Islands High Court of Justice of 28 January 2016, Rec. 581/2015
Judgment of the Canary Islands High Court of Justice of 30 March 2016, Rec. 989/2015
Judgment of the Canary Islands High Court of Justice of 18 April 2016, Rec. 110/2016
Judgment of the Castille and Leon (Valladolid) High Court of Justice of 26 September 2016, Rec. 1527/2016
Judgment of the Castille and Leon (Valladolid) High Court of Justice of 19 December 2016, Rec. 2099/2016

2. The revocation of the pensions uprating.

Following the Government's revocation of the pensions uprating as of 2012, the courts have handed down judgments in response to numerous complaints lodged by trade unions and associations of retired persons. In response to allegations of violations of Article 12.3 of the ESC and following the decisions on the merits of 7 December 2012 in the complaints of the Federation of Employed Pensioners of Greece (IKA-ETAM), Panhellenic Federation of Public Service Pensioners (POPS), Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.), Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) and Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece (Complaints nos. 76 to 80/2012), the lower courts and one regional court have ruled that the reform fails to comply with the principle of progressiveness.

Judgments at first instance:

Employment court no. 31, Barcelona, judgment no. 219 of 8 June 2015
Employment court no. 12, Barcelona, judgment no. 220 of 4 September 2015
Employment court no. 12, Barcelona, judgment no. 291 of 7 September 2015
Employment court no. 12, Barcelona, judgment no. 37 of 5 November 2015
Employment court no. 3, La Coruña, judgment no. 493 of 23 November 2015.

Judgments at second instance:

Judgment of the Castille and Leon (Valladolid) High Court of Justice of 18 May 2016, Rec. 361/2016

It should be noted that the majority at second instance ruled that the changed situation in Greece differed from that in Spain, since the latter only entailed a drop in pensions and, above all, in purchasing power.

3. Considering on-call periods as time actually worked.

Having regard to Article 2 of the ESC, the decision on the merits of 23 June 2010, Confédération générale du travail (CGT) v. France, Complaint No. 55/2009, and Conclusions CEDS XX-3 (2014), Spain, a court has ruled that on-call periods, that is ones

in which employees, while not being permanently and immediately at the employer's disposal, are obliged to remain at home or nearby to carry out work on behalf of the undertaking[17], must be treated as actual time worked.

Employment court no. 3, Barcelona, judgment no. 321 of 27 October 2015.

I consider that Spain is currently, of all the Council of Europe member states, the one that most readily acknowledges the direct and binding force of the ESC and the conclusions and decisions on the merits of the CEDS, through its first and second tier courts, even though it has not ratified either the revised Charter or the collective complaints protocol.

Spanish domestic legislation that infringes long-established citizens' and employees' human rights may be successfully challenged in the courts, thus protecting these rights "at a period of time when beneficiaries need protection the most".[18]. As the Supiot report notes, "labour law brought specific democratic demands into the socio-economic sphere, and they need to be maintained and reformulated in the light of present circumstances"[19].

With a view to making progress on this issue, I believe that work should focus on the following:

1. The effectiveness of the ESC and the decisions of the CEDS.

2. It is of critical importance for lower courts reviewing convention compliance to have a detailed knowledge of the ESC, particularly when the Constitutional Court gives precedence to economic freedoms and justifies the loss of rights by reference to the crisis.

3. Instead of contrasting the various international legal systems, they should be seen as offering several levels of protection that complement each other.

4. In the context of the European international panorama, the ESC must be at the centre of any relevant initiatives, and be treated as the fundamental social constitution of Europe. In that context, the recent opinion of the Council of Europe's Secretary General on the proposed European Pillar of Social Rights states that "it is necessary – with due regard for the competences and applicable law of the European

[17] See Article L 3121-9 of the French Labour Code (as amended by the Labour Act).

[18] Observation of the CEDS on the application of the ESC in the context of the current economic crisis (General Introduction, Conclusions XIX-2). The CEDS has stated that "the states parties have accepted to pursue by all appropriate means the attainment of conditions in which [a certain number of rights] may be effectively realised." The Committee continued "the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter". See, Nivard, C., "Seconde condamnation des mesures d'austérité grecques par le Comité européen des droits sociaux" (second condemnation of Greek austerity measures by the European Committee of Social Rights) in *Lettre "Actualités Droits-Libertés du CREDOF*, 11 May 2013 (http://revdh.org/2013/05/11/seconde-condamnation-mesures-austerite-grecques-comite-europeen-droits-sociaux/), pp. 1 ff.

[19] Report *Transformation of labour and future of labour law in Europe*. Rapporteur Alain Supiot, European Commission, Luxembourg: Office for Official Publications of the European Communities, 1999, p. 90. For an updated version of the report, which contains the outline of a genuine reform of labour law, see A. Supiot (Dir.), *Au-delà de l'emploi*. 2016, Editions Flammarion. Collection Essais.

Union – that [first] the provisions of the European Social Charter (Revised) should be formally incorporated into the European Pillar of Social Rights as a common benchmark for states in guaranteeing these rights; [and second] the collective complaints procedure, based on the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, should be acknowledged by the European Pillar of Social Rights for the contribution it has made to the effective realisation of the rights established in the Charter and to the strengthening of inclusive and participatory democracies"[20].

In conclusion, although Spain is far down the queue in terms of ratifying the revised Social Charter, it can be argued that knowledge of the treaty and its application in the employment and labour courts is expanding rapidly in response to human rights violations. This must continue and states must be reminded of and called on to comply with their international undertakings, with all rights being accorded equal value and safeguards[21].

[20]https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dd0bc.

[21] Jimena Quesada, L., "El último bastión en defensa de los derechos sociales: la Carta Social Europea", *Revista Jurídica de la Universidad Autónoma de Madrid*, 2014, no. 29, p. 187, file:///D:/Downloads/5607-11881-1-PB.pdf