



UNIVERSIDADE  
**CATÓLICA**  
PORTUGUESA

# The Right to Vocational Training as defined by the Article 10 of the European Social Charter

## The Portuguese Case

Carlos José de Aguiar Moniz Afonso  
345018012

Faculty of Law | Oporto School  
December 2018



The Right to Vocational Training as  
defined by the Article 10 of the European  
Social Charter  
The Portuguese Case

For the Seminar “The Multilevel Protection of Fundamental  
Social Rights”

Oriented by Professor Catarina Botelho

Carlos José de Aguiar Moniz Afonso  
345018012

Faculty of Law | Oporto School

## **Abstract**

The European Social Charter has arisen from a specific socio-political context, being a mechanism for safeguarding social and economic rights at an international regional level.

This essay will attend to the Portuguese situation over the last few years, in what concerns to its compliance with the Article 10 of the ESC: the right to vocational training.

After a brief reflection upon the nature of social rights, we will focus our analysis at the European Committee of Social Rights' conclusions, and then proceed with a critical reflection, reckoning that Portugal's performance leaves much to be desired. This conclusion will lead us to question the effectiveness of this system.

**Keywords:** Social Rights; European Social Charter; European Committee of Social Rights; The right to vocational training; The reporting system; Portugal.

## Summary

1. Introduction .....	1
2. A Brief Reflection Upon the Nature of Social Rights.....	2
3. The Article 10º and it's Interpretation.....	4
3.1. The Interpretation of Article 10§1 .....	5
3.2. The Interpretation of Article 10§2 .....	6
3.3. The Interpretation of Article 10§3 .....	6
3.4. The Interpretation of Article 10§4 .....	7
3.5. The Interpretation of Article 10§5 .....	7
4. The Portuguese Case .....	9
4.1. The Application of Article 10§1 .....	9
4.2. The Application of Article 10§2 .....	12
4.3. The Application of Article 10§3 .....	13
4.4. The Application of Article 10§4 .....	16
4.5. The Application of Article 10§5 .....	17
4.6. Summary and Some Critical Reflections .....	19
5. The Effectiveness of the European Social Charter.....	23
6. Conclusion.....	25
Bibliography .....	26

## **1. Introduction**

One of the greatest progresses brought by the XX century was the statement and consecration of social rights. The socio-economic disparities, which have long been reclaimed since the late XIX century, aligned with a global financial and social crisis and the horrors of two world wars created a new anthropocentric view, with a new axiology and the respect of human dignity as it's basilar pillar.

At an international regional level, the members of the Council of Europe signed the European Convention on Human Rights (1950) and the European Social Charter (1961), later revised in 1996.

The European Social Charter is a treaty signed by 43 of the 47 members of the Council of Europe that guarantees a broad range of social and economic rights, placing a major attention on vulnerable persons. It aims to apply the Universal Declaration of Human Rights within Europe, claiming that social rights are human rights on an equal footing with civil and political rights.

To assure that the commitments are honored by the State Parties, the European Committee of Social Rights, composed by 15 independent and impartial members, has an essential supervisory role. Two monitoring mechanisms were created: the Collective Complaints Procedure (presented by the social partners and other non-governmental organizations) and the Reporting System (the State Parties are obliged to regularly submit a report on the implementation of the Charter, which is examined by the Committee and followed by its conclusions).

In this essay, we will focus our attention on the Reporting System, proposing to analyze Portugal's compliance with the Article 10 ("The right to vocational training") over the last few years.

The choice of the right to vocational training was prompted by our belief that the right to education it's essential for the construction of a better and more cohesive society, for reducing the socioeconomic gaps and for promoting equal opportunities. Furthermore, education must be tailored to every person's abilities, needs and desires. In conclusion and as Nelson Mandela once said, because "education is the most powerful weapon which you can use to change the world".

## 2. A Brief Reflection Upon the Nature of Social Rights

For a long time we can verify that, in general, there has always been a segregation between liberty and social rights. Usually, liberty rights are seen as negative rights, requiring a “non facere” obligation, and cost-free; moreover, social rights are commonly regarded as positive rights, demanding a “facere” obligation, and costly.

However, we must disagree with that point of view. There are liberty rights that require some action by the State and are costly: let us focus, for example, on the right to vote: the State has to assemble a whole voting enterprise, must guarantee procedural conditions in order that citizens can exercise this liberty right. There are also some social rights with negative dimensions, for instance, the right to health implies that the State does not deprive citizens of that right; furthermore the concretization of social rights isn't necessarily costly, for instance, one of the ways to help fulfil the right to housing is by creating legislation that forbids abusive clauses in lease agreements.<sup>1</sup>

Therefore, we must conclude that, on the one hand “(...) both liberty and social rights have positive and negative dimensions”; and, at the other hand, “(...) that all fundamental rights have significant budgetary implications and the idea of cost-free rights is a myth”.<sup>2</sup>

In addition, many social rights that are established in constitutional texts have a heterogeneous content with imprecise outlines, consequently they do not have direct applicability, lacking legislative initiative. For many doctrines, this is a decisive argument in support of the segregation between liberty and social rights. However, we must consider two important ideas. First of all, that “(...) these difficulties are not exclusive of the social rights and are verified, often, among the liberty rights, as, for example, the freedom of expression and its limits and positive obligations in charge of the State”.<sup>3</sup> Secondly, that even though some social rights do not have direct applicability, it doesn't mean that they don't produce binding juridical effects. Social

---

<sup>1</sup> For more developments about this matter, CATARINA SANTOS BOTELHO, “Direitos Sociais em Tempos de Crise – Ou Revisitar as Normas Programáticas”, Coimbra, Almedina (2015), pp. 115-125.

<sup>2</sup> Idem., “Aspirational Constitutionalism, Social Rights Proximity and Judicial Activism: Triology or Trinity?” in *Comparative Constitutional Law and Administrative Law Quarterly* (2017), p. 70 (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3082954](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082954) )

<sup>3</sup> Idem., “Os Direitos Sociais num Contexto de Austeridade: Um Elogio Fúnebre ao Princípio da Proibição do Retrocesso Social?” in *Revista da Ordem dos Advogados*, Vol. I/II (2015), p. 267 (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2911142](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911142))

rights seem to have applicability in a broad sense<sup>4</sup>, related with the ability to put away contrary norms, they just cannot be invoked autonomously. “The difference is in its justiciability and/or susceptibility of autonomous invocation”<sup>5</sup>

For all the foregoing, we must conclude that the so called “language of indivisibility” that rules both at the international arena and in the constitutional texts it’s merely an artificial “cloak”. We must take in consideration that social rights are as important and fundamental as liberty rights, and ~~that’s~~ it’s not difficult to understand. For instance, could the right to life exist without the right to health, the right to housing, to an adequate standard of living? If so, what right would it be? What’s more, is it possible to configure the freedom of conscience, of speech, of expression apart from the right to education, to culture and to science? The answers will surely lead us to the conviction that liberty and social rights must be seen as a whole.

Some may consider this to be a party-political issue, and we dare to say that they are tremendously wrong, it’s much more than that. What’s at stake is nothing else than the fulfilment of the fundamental principle of human dignity and a demand for material/vertical equality and justice.<sup>6</sup>

Finally, we would just like to mention that social rights are not present in many countries’ fundamental texts, and their protection is left for the ordinary legislator (and perhaps that’s because those who would benefit from them lack political power, but that’s another issue). Meanwhile, “in the last decades we can identify a growing trend toward their consecration in constitutional texts.”<sup>7</sup>

---

<sup>4</sup> About the distinction between applicability in strict and broad sense please notice CATARINA SANTOS BOTELHO, “40 Years of Fundamental Social Rights - A Reflection on the Role of Fundamental Social Rights in the XXI Century” (2016), pp. 206-207 (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2912278](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2912278))

<sup>5</sup> Idem., “Os Direitos Sociais num Contexto de Austeridade: Um Elogio Fúnebre ao Princípio da Proibição do Retrocesso Social?” in *Revista da Ordem dos Advogados*, Vol. I/II (2015), p. 270-271

<sup>6</sup> About the concept of justice (as equality and as social justice) and the principle of tolerance (the “negative utilitarianism”): ARTHUR KAUFMANN “Filosofia do Direito”, Fundação Calouste Gulbenkian (2004), pp. 223-279

<sup>7</sup> CATARINA SANTOS BOTELHO, “Aspirational Constitutionalism, Social Rights Proximity and Judicial Activism: Triology or Trinity?” in *Comparative Constitutional Law and Administrative Law Quarterly* (2017), p. 67

### 3. The Article 10° and it's Interpretation

“ With a view to ensuring the effective exercise of the right to vocational training, the Parties undertake:

1. to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude;
2. to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments;
3. to provide or promote, as necessary:
  - a) adequate and readily available training facilities for adult workers;
  - b) special facilities for the retraining of adult workers needed as a result of technological development or new trends in employment;
4. to provide or promote, as necessary, special measures for the retraining and reintegration of the long-term unemployed;
5. to encourage the full utilisation of the facilities provided by appropriate measures such as:
  - a) reducing or abolishing any fees or charges;
  - b) granting financial assistance in appropriate cases;
  - c) including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment;
  - d) ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other European Social Charter training arrangements for young workers, and the adequate protection of young workers generally. ”

To interpret is to extract the meaning out of something, “through interpretation we make that meaning «talk», it is announced with other words, expressed in a more clear and precise way, and becomes communicable”.<sup>8</sup>

We've already focused on the nature of social rights, and now, in order to proceed with the analysis of the Committee's conclusions, firstly it is necessary to determine which obligations are demanded by the Article 10 to the Contracting Parties.

The “Digest of the Case Law of the European Committee of Social Rights” has an essential role, as it “presents the interpretation that the Committee has made of the different articles of the European Social Charter”(p.7)<sup>9</sup>. Although not binding, it provides the interpreter with some fundamental principles of interpretation (such as the

---

<sup>8</sup> LARENZ, KARL, “Metodologia da Ciência do Direito”, Lisboa, Fundação Calouste Gulbenkian (1997), p. 441

<sup>9</sup> The “Digest of the Case Law of the European Committee of Social Rights”, (that we will refer as “The Digest”) is available at <https://rm.coe.int/168049159f>.



adoption of an interpretation that respects the “shared values of solidarity, non-discrimination and participation”), specifies the meaning of each particular article and guides the Committee at its monitoring task, providing indicators of compliance and other criteria.

### 3.1. The Interpretation of Article 10§1

The State Parties are obliged to provide or promote, as when necessary, the technical and vocational training of all persons, in consultation with employers' and workers' organisations, guarantying the appropriate facilities for access to higher technical and university education.

According to the “Digest”, “(...) the notion of vocational training of Article 10§1 covers: initial training - i.e. general and vocational secondary education - university and non-university higher education, and vocational training organised by other public or private actors including continuing training (...)”<sup>10</sup>. Therefore, all the educational system must be taken into consideration.

It is also necessary for the Contracting States to build bridges between secondary vocational education, university and non-university higher education, to introduce several mechanisms of recognition of knowledge, experience and qualifications and to consider the professional integration in the job market.

This right must be guaranteed to everyone, and there can be no discrimination between nationals and non-nationals, as “ (...) equality of treatment shall be provided to nationals of other Parties lawfully resident or regularly working on the territory of the Party concerned (...)” unless students and trainees, “ (...) without having the above-mentioned ties, entered the territory with the sole purpose of attending training”.<sup>11</sup>

The vocational training of persons with disabilities, should be dealt with under the Article 15 of the Charter for States having accepted that article (only Turkey hasn't)

In short, the paragraph obliges the Parties to create their whole education system (including initial training, university and non-university education, and continuing training) to be based on individual aptitude. We can actually defend that what is at stake

---

<sup>10</sup> Cited from p. 75 of the “Digest”.

<sup>11</sup> Cited from p. 76 of the “Digest”.

is nothing else than a reflex of the basic principle “*suum cuique tribuere*” translated as “to each his own” or “may all get their due”<sup>12</sup>: everyone has the right to get the training accordingly to its capacities, needs and choices.

### 3.2. The Interpretation of Article 10§2

The State Parties must provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments that may combine theoretical and practical training, in a close relation between the training establishments and the working world.

According to “Digest”, apprenticeship “(...) means training based on a contract between the young person and the employer, whereas other training arrangements can be based on such a contract, but also be school-based vocational training.”<sup>13</sup> It is also required the existence of an employment relationship.<sup>14</sup>

Equal treatment in the access to apprenticeship and other training arrangements must also be guaranteed to non-nationals on the basis of the conditions mentioned under the first paragraph.

### 3.3. The Interpretation of Article 10§3

The Charter has also a special concern for the adult workers, since the Parties need to provide or promote adequate training and retraining facilities for them and establish special facilities to deal with technological development and new employment trends. Truly, there is a need to ensure the right to continuous vocational training, either to employed and unemployed persons.

This right intends to be very comprehensive, as the Committee should examine “(...) all forms of labour market training and education for adult workers (...)”<sup>15</sup>

---

<sup>12</sup> KAUFMAN, ARTHUR, “Philosophy of Law”, Fundação Calouste Gulbenkian (2004), pp. 233 and 273.

<sup>13</sup> Cited from p. 77 of the “Digest”.

<sup>14</sup> Conclusions XIV-2, Statement of Interpretation on Article 10§2, pp. 60-61:

<sup>15</sup> Conclusions XIV-2, Statement of Interpretation on Article 10§3, p. 61

Moreover, the analysis of the paragraph's compliance should take separately into consideration employed and unemployed persons.

This paragraph concerns only those of the activation measures for unemployed people that strictly concern training. The first paragraph deals with general activation measures for unemployed people, while the specific measures for long-term unemployment are dealt with under the forth.<sup>16</sup>

Once again, there should be no (direct or indirect) discrimination between nationals and non-nationals. Migrant workers must benefit from the same help in the matter of vocational training and retraining.

### 3.4. The Interpretation of Article 10§4

This paragraph provides ~~for~~ special measures for the retraining and reintegration of the long-term unemployed, as it must be fought by the State Parties with retraining and reintegration measures.

The long-term unemployment is the situation by which a person is without work for a period of twelve months or more. Then, these situations have to be appreciated under the Article 10§4.<sup>17</sup>

Equal treatment with respect to access to training and retraining for long-term unemployed persons must be guaranteed to non-nationals on the basis of the conditions mentioned under paragraph 1.

### 3.5. The Interpretation of Article 10§5

“While paragraphs 1 to 4 of Article 10 mainly deal with the right of access to vocational training and continuing vocational training, paragraph 5 focuses on complementary measures which are nonetheless fundamental to make access effective in practice.”<sup>18</sup> The list presented is merely exemplificative and not exhaustive; the usage of the term “such as” leads us to infer that.

---

<sup>16</sup> Conclusions 2003, Italy, p. 272

<sup>17</sup> Conclusions 2003, Italy, p. 274

<sup>18</sup> Cited from p. 79 of the “Digest”.

Vocational training should be provided free of charge or the fees should be reduced. The right also covers the granting of financial assistance, because in some cases the very existence of the right may depend on it.<sup>19</sup> Which means that assistance should at least be available for those in need and should be suitable to living costs.

The time spent in supplementary at the request of the employer that may be helpful in connection with the current occupation of the worker should be included in the normal working-hours.

States must also evaluate their vocational training programmes for young workers, including the apprenticeships. The participation of employers' and workers' organisations is required in the supervision process.

After a close examination of the Article, the Committee emphasized “(...) that the words "as necessary" in paragraph 1 give each country a considerable margin of discretion in choosing the means to guarantee the right to vocational training, whereas paragraph 4 explicitly requires that financial assistance to trainees be granted in "appropriate cases" in order to encourage the full utilisation of available training facilities. Consequently, paragraphs 1, 2 and 3 should not be taken to confer on states an obligation to provide financial assistance for all trainees. In the light of these considerations the Committee decided to treat all questions of financial assistance exclusively under Article 10 paragraph 4.”<sup>20</sup>

---

<sup>19</sup> Conclusions VIII, Statement of Interpretation on Article 10§5, p. 136.

<sup>20</sup> Conclusions XIV-2, Statement of Interpretation on Article 10§5, p. 62

## 4. The Portuguese Case

As far as the respect for the right to vocational training is concerned and having in mind the Committee's recent conclusions, we will try to trace a general evolutionary overview of the Portuguese situation.

### 4.1. The Application of Article 10§1

As we have already mentioned, this paragraph concerns the obligation of the Parties to provide technical and vocational training, and to guarantee the access to higher technical and university education.

#### i) The Conclusion XVI-2 (reference period 01/01/1997 to 31/12/2000)<sup>21</sup>

In the report submitted, the Committee took note of the organisation and functioning of the secondary and higher education systems in Portugal.

As far as secondary education is concerned, after nine years of compulsory schooling, pupils could attend general or technical secondary education or vocational education. The "Professional Schools" represented an alternative to the regular education system. Regarding higher education, it was divided into university and polytechnics education.

In 1997, initial vocational training courses have been launched for young people who drop out from compulsory schooling or who have completed only basic education. These courses were organised by schools with the support of the public employment service ("Employment and Vocational Training Institute"- the "IEFP"). In the two following years the number of participants grew significantly.

From Eurostat, the Committee observed that, during the reference period, Portugal spent yearly 5,6 % of the GDP on education and training, which amounts to around 27 million € per year.

---

<sup>21</sup> <http://hudoc.esc.coe.int/eng/?i=XVI-2/def/PRT/10/1/EN>

However, the Committee noted that it was missing information about the total amount of expenditure for education and training in the report and asked that the next report be provided significant information for the relevant reference period.

As a result, the Committee concluded that the situation in Portugal was in conformity, pending receipt of the information requested.

ii) The Conclusion of 2008 (reference period: 01/01/2005 to 31/12/2006)<sup>22</sup>

At the end of 2005 the Portuguese Government launched the “New Opportunities Initiative” (INO), in order to create better opportunities for young people and to improve their levels of schooling, vocational training and basic qualifications.

Two projects were planned to be implemented by the end of 2006, namely to produce a National Qualifications Catalogue and to launch the foundations for a new methodology for designing competency-based qualifications.

According to the report, the Committee also noted that the financing of the education system was assured by three principal sources: the general state budget, social security contributions and the European Social Fund.

In 2005, the total expenditure on education amounted to 5,4% of GDP.

Therefore, the Committee concluded that the situation was in conformity.

iii) The Conclusion of 2012 (reference period: 01/01/2007 to 31/12/2010)<sup>23</sup>

In March 2007, the Government and the social partners signed an Agreement for the Reform of Vocational Training, that brought about the creation and implementation of two fundamental instruments: the “National Qualifications System” (NQS) (as a framework of reference for the whole national education and training system); and the “System for Regulating Access to Professions” (as a framework for structuring access to and the exercise of professions in Portugal).

---

<sup>22</sup> <http://hudoc.esc.coe.int/eng/?i=2008/def/PRT/10/1/EN>

<sup>23</sup> <http://hudoc.esc.coe.int/eng/?i=2012/def/PRT/10/1/EN>

In parallel, Portugal also undertook a set of initiatives designed to broaden and improve basic and secondary education/training and to increase the level of compulsory education in Portugal to the secondary level.

However, the report did not contain information about higher education. So the Committee asked to include it in the next report. Consequently, pending receipt of the requested information, the Committee concluded that the situation in Portugal was in conformity with Article 10§1 of the Charter.

iv) The Conclusion of 2016 (reference period: 01/01/2011 to 31/12/2014)<sup>24</sup>

The Committee noted that the vocational training framework was provided by two fundamental instruments: the “National Qualifications System” (NSQ) and the “System for Regulating Access to Professions” (SRAP).

Since 2011, several reforms were introduced, that aimed to achieve a better matching amidst the supply in higher education with the demands of the labour market.

The Portuguese Government outlined a complete framework of strategic measures regarding higher education, such as the “+Superior Programme” (which sought to improve territorial cohesion) and the “Programa Retomar” (launched to support the return of students who dropped out of higher education for economic reasons).

The Committee asked to be informed of the implementation of this strategic framework and about the effectiveness of these measures, given the high youth unemployment rate.

While waiting for the requested information, the Committee concluded that the situation in Portugal was in conformity.

---

<sup>24</sup> <http://hudoc.esc.coe.int/eng/?i=2016/def/PRT/10/1/EN>

## 4.2. The Application of Article 10§2

### i) The Conclusion XVI-2 (reference period 01/01/1997 to 31/12/2000)<sup>25</sup>

During the reference period, participants in apprenticeship have increased from 13 033 in 1997 to 29 111 in 1999. Apprenticeship was financed by public programmes for a total amount of 290 million € during the whole period of reference.

Training is primarily provided by the public employment service (the “IEFP”), but also private operators can apply for funding.

Due to the evolution of the legal and practical framework of the apprenticeships’ organisation at national level, the Committee had difficulties in evaluating its conformity with Article 10§2. As a consequence, the Committee deferred its conclusion and asked to be provided more detailed information in the next report.

### ii) The Conclusion of 2008 (reference period: 01/01/2005 to 31/12/2006)<sup>26</sup>

In reply of the request made in the last conclusion, the Committee noted from the report that the share of practical training was at least 30% of the total training and it finished with a job simulation exercise. The apprenticeship contract, specifying the applied regime (object of the contract, place of training, timing, evaluation...), ~~was~~ had to be done between the apprentice and the body responsible for the training.

Apprentices had the right to financial aid in the amount of 15% of the minimum monthly income guaranteed by the legislation, which was paid out of the public funds. They also had the right to other aid such as food, accommodation, transport etc.

From the moment that the request was fulfilled, the Committee concluded that the situation in Portugal was in conformity.

---

<sup>25</sup> <http://hudoc.esc.coe.int/eng/?i=XVI-2/def/PRT/10/2/EN>

<sup>26</sup> <http://hudoc.esc.coe.int/eng/?i=2008/def/PRT/10/2/EN>



iii) The Conclusion of 2012 (reference period: 01/01/2007 to 31/12/2010)<sup>27</sup>

In 2008, 19 260 persons carried out an apprenticeship and 49 488 110.41 € were spent in order to fund the apprenticeship programmes. In 2009, a decrease in the number of apprentices and funds was observed (12 812 persons) and 39 452 285 € were spent to this proposal, while in 2010, there was an increase in the number of apprentices and funds, (16 172 persons and 60 886 699.97 € were spent).

Two other special apprenticeship measures took place: “Vocational Internships in the Public Administration” (a measure for young graduates who were unemployed or looking for their first job) and “Qualification-Employment Vocational Traineeships” (to support the transition from the qualification system to the labour market by unemployed who have recently improved their qualifications).

The Committee concluded that the situation was in conformity with the Charter.

iv) The Conclusion of 2016 (reference period: 01/01/2011 to 31/12/2014)<sup>28</sup>

The National Qualifications System established apprenticeship courses as an initial vocational education and training modality, in order to support the labour market entrance of young people (15- 25 years). They were provided by the vocational training centers of the Institute for Employment and Vocational Training.

The Committee noted that in the course of 2010-2013 the number of apprentices has gone up from 24,129 persons in 2010 to 40,246 in 2013.

Once again, the Committee concluded that the situation in Portugal was in conformity.

### 4.3. The Application of Article 10§3

i) The Conclusion XVI-2 (reference period 01/01/1997 to 31/12/2000)<sup>29</sup>.

---

<sup>27</sup> <http://hudoc.esc.coe.int/eng/?i=2012/def/PRT/10/1/EN>

<sup>28</sup> <http://hudoc.esc.coe.int/eng/?i=2016/def/PRT/10/1/EN>

<sup>29</sup> <http://hudoc.esc.coe.int/eng/?i=XVI-2/def/PRT/10/3/EN>

The Portuguese report provided information about the continuing vocational training system for employed and unemployed adult people.

Continued vocational training was organised along two ways: qualification courses based on a credits system (to offer a more flexible form of training) and adult education and training (that targeted employed and unemployed people who were unqualified or non-adequately qualified to advance or re-enter the labour market).

In addition, the “REDE” programme aimed to support SMEs (small and medium-sized enterprises) to develop their management and to train their personnel.

Regarding the employed people, and according to Eurostat, only 17 % of employees participated in some form of continuing vocational training. For that reason, the Party was asked which measures were being planned to increase that number.

The Committee also required the next report to provide information about the extent of continuing vocational training provided within the enterprises themselves and the existence of preventive measures against the deskilling of still active workers at risk of becoming unemployed as a consequence of technological and/or economic progress.

In what the unemployed people are concerned, and according to Eurostat, the Committee observed that in this period the number of unemployed people decreased from 6,8 % to 4,1 % of the labour force. The share of long-term unemployed as percentage of total unemployment was 42,9 % in 2000.

The activation rate of unemployed people<sup>30</sup> was 7,8% in 1998, 7,4% in 1999, and 7% in 2000. These rates were very low, so the Committee asked for the next report to give more information in the next report on how the government planned to raise them.

The Committee also requested information on the sharing of the burden of the cost of continuing training among public bodies, insurance systems, enterprises, and households.

Pending receipt of the information requested, the Committee concluded that the situation in Portugal is in conformity with Article 10§3 of the Charter.

---

<sup>30</sup> The “activation rate of unemployed people” corresponds to the ratio between the annual average number of previously unemployed participants in active measures divided by the number of registered unemployed persons and participants in active measures.

ii) The Conclusion of 2008 (reference period: 01/01/2005 to 31/12/2006)<sup>31</sup>

Regarding employed people, in the previous report, only 17% of employees participated in some form of vocational training; in 2004 that number rose to 22%.

In the last Conclusion, the Committee asked what preventive measures were implemented against the deskilling of active workers at risk of becoming unemployed as a consequence of technological and/or economic progress. A specific measure, “FACE”, has been implemented, thus the Committee wished to be informed about its results.

Regarding unemployed, the Committee noted from Eurostat that the unemployment rate in Portugal rose from 4% in 2001 to 7.7% in 2006. So, it asked what measures had been taken for unemployed persons and what their activation rate was.

As a result, the Committee concluded that the situation was in conformity with Article 10§3, pending receipt of the information asked.

iii) The Conclusion of 2012 (reference period: 01/01/2007 to 31/12/2010)<sup>32</sup>

Concerning employed people, we must emphasize the prevision of vocational training rights in “The Labour Code” (Articles 130 to 134)<sup>33</sup>, such as the entitlement to a minimum of 35 hours per year and the obligation of each enterprise to provide lifelong training for at least 10% of its staff each year.

Regarding the unemployed, in 2010, job centres started to direct them to the national network of “New Opportunities Centres”, the “Basic Competency Training Programme”, and the “Training Initiative for Entrepreneurs”. The data showed that from 2007 to 2009, there were 218 481 unemployed persons that received training from the NOCs.

In consequence, the situation in Portugal was considered to be in conformity.

---

<sup>31</sup> <http://hudoc.esc.coe.int/eng/?i=2008/def/PRT/10/3/EN>

<sup>32</sup> <http://hudoc.esc.coe.int/eng/?i=2012/def/PRT/10/3/EN>

<sup>33</sup> Accessible at [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=1047&tabela=leis](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1047&tabela=leis)

iv) The Conclusion of 2016 (reference period: 01/01/2011 to 31/12/2014)<sup>34</sup>

The “Modular Training” aimed to promote the adaptability of people in employment by improving competencies that can be of a general nature or specific to an occupation.

Some updated information was requested about the existence of legislation on individual training leave, its remuneration and the burden-sharing of the costs.

Regarding to the unemployed, the “Working Life Measure” was created in 2013 with a view to monitoring unemployed people more regularly and effectively.

Pending receipt of the information requested, the Committee concluded that the situation was in conformity with Article 10§3.

#### 4.4. The Application of Article 10§4

i) The Conclusion of 2008 (reference period: 01/01/2005 to 31/12/2006)<sup>35</sup>

According to Eurostat, the long-term unemployed rate in Portugal rose from 38% in 2001 to 50,2% in 2006. The EU 27 average stood at 45,6% in 2006.

The Committee recalled that States must fight long-term unemployment through retraining and reintegration measures and indicated the main indicators of conformity.

Therefore, the Committee deferred its Conclusion and asked ~~the next report~~ to be provided this information in the next report.

ii) The Conclusion of 2012 (reference period: 01/01/2007 to 31/12/2010)<sup>36</sup>

No information was submitted regarding vocational training of long-term unemployed. For that reason, the Committee considered that in Portugal it was not guaranteed that the right to vocational training for long term unemployed had been established.

The situation was considered not to be in conformity.

---

<sup>34</sup> <http://hudoc.esc.coe.int/eng/?i=2016/def/PRT/10/3/EN>

<sup>35</sup> <http://hudoc.esc.coe.int/eng/?i=2008/def/PRT/10/4/EN>

<sup>36</sup> <http://hudoc.esc.coe.int/eng/?i=2012/def/PRT/10/4/EN>

iii) The Conclusion of 2016 (reference period: 01/01/2011 to 31/12/2014)<sup>37</sup>

According to the European Commission Country Report 2015, the Committee noted that, even taking into account the downward trend, unemployment was still high at 13.7% in the third quarter of 2014 and long-term unemployment as a proportion of the total stood at over 60%; Youth unemployment was particularly high, standing at 32.2% in the same period.

The long expected report indicated that vocational trainings and programmes have been addressed to young people, employed and unemployed people. Since 2013 it has been mandatory a training module (“Cross-Cutting Training”) for all registered unemployed

In 2014, 494 people attended this training, a small number we must say

Once again, the report did not answer the demanded questions, therefore the Committee requested that information, considering that it was not established that the right was guaranteed in Portugal. So, it concluded that the situation lacked conformity.

#### 4.5. The Application of Article 10§5

i) The Conclusion XVI-2 (reference period 01/01/1997 to 31/12/2000)<sup>38</sup>

In the reference period, secondary education in Portugal was free of charge. Fees of a very small amount were charged for higher education, and needy students were entitled to receive scholarships and other kinds of help.

Workers that undergoing training during or outside working-time could benefit from a food allowance and of risk insurance. Those who undertake training at their own initiative to improve their qualifications could benefit from the support of the IEFP.

Unemployed people undergoing vocational training benefited from a training allowance, help for meals, lodging, child-care, transports, and insurance. If they were undertaking training at their own initiative, they could benefit from financial public support.

---

<sup>37</sup> <http://hudoc.esc.coe.int/eng/?i=2016/def/PRT/10/4/EN>

<sup>38</sup> <http://hudoc.esc.coe.int/eng/?i=XVI-2/def/PRT/10/4/EN>

From a reading of Act No. 113/97 and Act No. 134/99 (ban of any racial discrimination meant as any distinction, restriction or exclusion done on the ground of nationality) the Committee concluded that equality of treatment was also guaranteed with respect to financial assistance for higher education.

The Committee asked if it was required a specific period of residence or employment so that nationals of the other Contracting Parties could benefit of the same financial support.

It was requested if the time spent on supplementary training at ~~the request of the~~ employer's request was included in the normal working hours.

Regarding the efficiency of training, the report, without specifying it, referred that a new procedure of evaluation was created, so more detailed information was requested.

Consequently, pending receipt of the requested information about equal treatment and the inclusion of training in the normal working hours, the Committee deferred its conclusion.

ii) The Conclusion of 2008 (reference period: 01/01/2005 to 31/12/2006)<sup>39</sup>

The report did not provide the requested information concerning the equality of access to financial aid of nationals of other Parties legally resident of regularly working.

Regarding the required information about training working hours, the Article 169, No 5 of the Law No 35/2004 stated that the hours spent in training were to be included in the normal working hours.

To respond to the Committee's request regarding the new procedure of evaluation of training, Portugal reported that Guide to Good Practices was created.

As a result, the Committee concluded that the situation in Portugal was not in conformity as it has not been established that it was guaranteed .the equality of treatment of other State Parties' nationals lawfully resident or regularly working in Portugal.

---

<sup>39</sup> <http://hudoc.esc.coe.int/eng/?i=2008/def/PRT/10/5/EN>

iii) The Conclusion of 2012 (reference period: 01/01/2007 to 31/12/2010)<sup>40</sup>

The report presented merely stated that the principle of equal treatment was fully implemented in the funding of vocational training in Portugal.

The Committee asked ~~for~~ that the next report ~~to~~ should contain information on the system of fees and financial support in secondary and higher education and on the means used to supervise and ensure efficiency of training.

Because of that, the Conclusion was deferred. In addition, the Committee considered that the absence of the information required amounted to a breach of the reporting obligation entered into by Portugal under the Charter. Consequently, the Contracting Party had an obligation to provide the requested information in the next report.

iv) The Conclusion of 2016 (reference period: 01/01/2011 to 31/12/2014)<sup>41</sup>

The Government had persistently failed to provide information on equal treatment of foreign nationals, legally resident or regularly working in Portugal.

Therefore, the situation in Portugal was considered not to be ~~not~~ in conformity with Article 10§5 of the Charter, because it has not been established that foreign nationals, lawfully resident have equal access to financial assistance for studies.

#### 4.6. Summary and Some Critical Reflections

##### i) Article 10§1

In general, the Committee is satisfied with secondary and higher education, since both levels of the educational system take into consideration the student's abilities, desires and expectations. Thus, we can say that the right to vocational training is respected as far as the mainstream educational system in our country is concerned

However, two relevant considerations must be done about this particular issue.

---

<sup>40</sup> <http://hudoc.esc.coe.int/eng/?i=2012/def/PRT/10/5/EN>

<sup>41</sup> <http://hudoc.esc.coe.int/eng/?i=2016/def/PRT/10/5/EN>

Firstly, the expense in education when compared to the GDP (gross domestic product) has been decreasing throughout the years: for example, while in 2004, the Eurostat noted that Portugal spent 5,4% of the GDP on education and training; that number decreased for 5,2%, 5,04% and 4,79% in 2013, 2014 and 2015, respectively. While, in 2015, France spent 5,47%, Norway 6,72% and Sweden 7,05%. <sup>42</sup>

Secondly, it's essential to make reference to the territorial asymmetries, since Portugal is one of the most centralized countries of the UE. In fact, most of the universities and vocational training centres are located at Lisbon, Oporto and along the coastline cities.<sup>43</sup> So we must question if the right to vocational training is being equality provided to all students and citizens.

Therefore, we must conclude (or at least suspect) that the reporting system might not express a real and critical reflex of the Portuguese reality, since the Committee in most Conclusions regarding Article 10§1 stated that the situation was in conformity.

#### ii) Article 10§2

Regarding the right of young boys and girls to access a system of apprenticeship and other systematic arrangements the Committee, in the reference period 01/01/1997 to 31/12/2000 deferred its conclusion and asked the next report to provide more detailed information.

In 2008, that request was fulfilled. Since then, the Committee as always concluded that the situation in Portugal was in conformity.

#### iii) Article 10§3

The number of participants in vocational retraining programmes, such as the “New Opportunities Initiative” and the “Basic Competency Training Programme” has gone very high from the period from 2007 to 2014.<sup>44</sup> We could say that this was due to the

---

<sup>42</sup> Source: Eurostat (<https://ec.europa.eu/eurostat/data/database>)

<sup>43</sup> An excellent study elaborated by the “Minho University” about the asymmetries in Portugal, can be found at [https://cciporto.com/wp-content/uploads/2018/11/Assimetrias\\_e\\_Convergencia\\_Regional.pdf](https://cciporto.com/wp-content/uploads/2018/11/Assimetrias_e_Convergencia_Regional.pdf) (relevant for this issue: pp.17-21 and 85-86)

<sup>44</sup> According to the Adult Education Survey (AES), between 2007 and 2016 “the participation in informal learning activities more than doubled, reaching 5,7 millions of people in 2016 (in 2007 were 2,8 millions)”.



great success that this retraining initiatives had, but actually it was due to the rise of the unemployment rate,<sup>45</sup> because the unemployed were obliged to frequent this programmes.

Also regarding this retraining initiatives, The “New Opportunities Initiative” has always been the subject of numerous controversies and criticisms, especially regarding its lack of quality and the usefulness to the labour market.<sup>46</sup>

In general, although pending receipt of many requested information, the Committee concluded that the Portuguese situation regarding the training and retraining of adult workers was in conformity with the Article 10§3 of the Charter. Once again, the Committee was not aware of other relevant circumstances besides the report that could influence its decision.

#### iv) Article 10§4

Regarding the long-term unemployment and in the reference period 01/01/2005 to 31/12/2006, the Committee asked to be provided more detailed information and deferred its conclusion in the next report

In the following reports, Portugal failed to submit the requested information, so the Committee considered (in 2012 and in 2016) that the right to vocational training for long term unemployed was not guaranteed.

In conclusion, Portugal’s conduct as far as providing of information is concerned, was tremendously unsatisfactory. For that reason, the conformity with the Charter was never declared.

---

([https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine\\_destaques&DESTAQUESdest\\_boui=281448128&DESTAQUEStema=5414265&DESTAQUESmodo=2&xlang=pt](https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_destaques&DESTAQUESdest_boui=281448128&DESTAQUEStema=5414265&DESTAQUESmodo=2&xlang=pt)).

<sup>45</sup> The unemployment rate in 2008 was 8,8% of the active population, it rose over the years, and in 2013 reached 16,4% (more than half [56,4%] was long-term unemployment). Source: Eurostat

<sup>46</sup> About this criticism, <https://tvi24.iol.pt/politica/assembleia-da-republica/novas-oportunidades-criticas-no-parlamento>

v) Article 10§5

Overall, in what concerns the complementary measures fundamental to make the access to vocational training effective in practice, Portugal failed to correspond to its obligations towards the Charter.

The Portuguese Government had persistently (since Conclusions 2008) failed to provide information on equal treatment of foreign nationals, legally resident or regularly. So, after some deferments and one conclusion of non-conformity, in its latest Conclusion (2016) the situation in Portugal was considered not to be in conformity with Article 10§5.

Therefore, the application of the paragraph has been questionable.

## 5. The Effectiveness of the European Social Charter

It results from the analysis presented that, continuously, the State Parties failed to provide the requested information to the Committee, or, having presented it the Committee considered that the situation was not in conformity; or even, that the Committee's conformity conclusion might not have taken into consideration some other important facts, besides the presented at the report.

Therefore, we should naturally question the true effectiveness of the whole system presented by the European Social Charter. Moreover, according to Lammy Bennet the Charter has always been a "rather obscure instrument"<sup>47</sup>. It is so due to four main reasons.

Firstly, it is related with flexibility of the system, since it gives the possibility for the State Parties to choose which provisions of the Charter will have a binding effect for them, like a "charter à la carte".<sup>48</sup>

Secondly, because in the reporting mechanism, the State itself prepares and sends the information to the Committee; the State will almost inevitably leave out information which could be important in the compliance assessment process. For that reason the report will inevitably tend to be more subjective and discretionary.<sup>49</sup>

Thirdly, due to the fact that the collective complaints system (perhaps far more exemplificative of the true state of things) is a merely optional procedure and not many Contracting Parties have accepted it. Added to this, we must admit that the number of complaints it's not very large.<sup>50</sup>

Lastly, because ultimately the Committee fails to determine whether the situation has been brought into compliance with the Charter by the State Party concerned, as "(...) there are no specific legal leverages for the control of State compliance with the conclusions of ECSR".<sup>51</sup> No fine or penalty is predicted, it's merely political. Usually the States comply, but not always.

---

<sup>47</sup> L. BENNET, cited by AART HENDRICKS in "Revised Social Charter", Netherlands Quarterly of Human Rights Volume: 14 Issue 3, (1996), p. 341

<sup>48</sup> JOANNA MACIEJEWSKA, Polish Quarterly of International Affairs, Vol. 14, Issue 3 (2005), p. 47

<sup>49</sup> C. M. AMHLAIGH and M. NEDELKA, University College Dublin Law Review, Vol. 1, p. 73

<sup>50</sup> JOANNA MACIEJEWSKA, Polish Quarterly of International Affairs, Vol. 14, Issue 3 (2005), p. 49

<sup>51</sup> CRISTINA SÂMBOAN, Perspectives of Business Law Journal, Vol 2, Iss 1 (2003), p.229

Still, the Charter's impact is not purely symbolic; it had and has some important practical effects.<sup>52</sup> "These structural imperfections (...) do not, however, cast away the jurisdictional trait of the ECSR".<sup>53</sup>

The reporting obligation acts as a discrepancy corrector, it works as a "yardstick"<sup>54</sup> through which the local policies can be measured and compared to the other State Parties achievements.

On the one hand, the system has the quality to place a decent amount of political pressure at the State Parties politicians' shoulders. It makes governments accountable of their laws and practices, as national authorities are required to take measures to give the Committee's decisions and conclusions effect under domestic law.

On the other hand, domestic courts can declare invalid or set aside domestic legislation if the Committee has ruled that it is not in compliance with the Charter. The Committee's case law stands as an educative source of inspiration both for international human rights protection courts and for the lawyer and national Judge, "(...) this jurisprudence brings a notable tribute to raising the standards in ESCRs area as well as polishing the European social model."<sup>55</sup>

At last, we must recognize the great merits of the collective complaints system, since it has the ability to correct some of the collective complaints' flaws, becoming a generous option for its beneficiaries, "(...) always handy and more inviting as it is not subject to the limitation of domestic remedies and, in addition, it addresses to a qualified and benevolent "ear" (...)." <sup>56</sup>

In conclusion, despite its flaws, we've seen that this system has some interesting qualities. The main idea to retain is that there is room for improvement: the Contracting Parties could be obliged to sign all of the rights contained in the Charter; an independent body could be set up to investigate compliance of the provisions and compile the reports; the collective complaints system should be compulsory; and an administrative sanction could be introduced where a breach is consistently re-occurring in the reports.

---

<sup>52</sup> C. M. AMHLAIGH and M. NEDELKA, University College Dublin Law Review, Vol. 1, p. 75

<sup>53</sup> CRISTINA SÂMBOAN, Perspectives of Business Law Journal, Vol 2, Iss 1 (2013), p. 229

<sup>54</sup> C. M. AMHLAIGH and M. NEDELKA, University College Dublin Law Review, Vol. 1, p. 88

<sup>55</sup> CRISTINA SÂMBOAN, Perspectives of Business Law Journal, Vol 2, Iss 1 (2003), p.232

<sup>56</sup> Ibidem, p. 232

## 6. Conclusion

The European Social Charter is a reflex, at an international regional level, of a specific (and valorous, we must say) anthropocentric view that arisen at the second half of the XX century.

Despite some dissenting voices, we must intransigently defend that social rights are human rights, at the same level and with the same dignity of civil and political rights, booth with negative and positive dimensions.

The presence of the right to vocational training in the Charter it's a clear sign of the importance given by our European civilization to the role of education in the construction of a cohesive society, with equal opportunities and with respect for every person's abilities, needs and desires, since the training must be vocational.

The general idea that remains of Portugal's compliance with the requirements demanded by the reporting system is that, most of the times, the Committee was unsatisfied with the amount of information given and required more detailed information. in the following report-

We've also concluded that, despite many flaws, the system has positively contributed to the assertion of social rights in Europe, in a new globalized century that brought many doubts about "(...) not only the possibility of raising social welfare standards to ever higher levels but even the justification for turning them into absolutely binding legal norms."<sup>57</sup>

Finally, we would simply like to emphasize that usually, around the world, the institutions compromised with the realization of social rights, don't have the power to enforce them. However, it is essential to end this essay with the thought that there is always room for improvement.

---

<sup>57</sup> JOANNA MACIEJEWSKA, Polish Quarterly of International Affairs, Vol. 14, Issue 3 (2005), p. 49

## Bibliography

- AMHLAIGH, M. C., & NEDELKA, M. (2001). Forty Years of the European Social Charter: Celebration or Commiseration? *University College Dublin Law Review*, Vol. 1, pp. 67-91.
- BOTELHO, C. S. (2015). *Direitos Sociais em Tempos de Crise – Ou Revisitar as Normas Programáticas*. Coimbra: Almedina.
- BOTELHO, C. S. (2015). Os Direitos Sociais num Contexto de Austeridade: Um Elogio Fúnebre ao Princípio da Proibição do Retrocesso Social? *Revista da Ordem dos Advogados*, Vol. I/II, pp. 259-294.
- BOTELHO, C. S. (2016). 40 Years of Fundamental Social Rights - A Reflection on the Role of Fundamental Social Rights in the XXI Century. *Revista Julgar*, pp. 197-216.
- BOTELHO, C. S. (2017). Aspirational Constitutionalism, Social Rights Proximity and Judicial Activism: Triology or Trinity? *Comparative Constitutional Law and Administrative Law Quarterly*, pp. 62-81.
- HENDRICKS, A. (1996). Revised European Social Charter. *Netherlands Quarterly of Human Rights*, Volume 14 , pp. 341-359.
- KAUFMANN, A. (2004). *Filosofia do Direito (Philosophy of Law)*. Fundação Calouste Gulbenkian.
- LARENZ, K. (1997). *Metodologia da Ciência do Direito*. Lisboa: Fundação Calouste Gulbenkian.
- MACIEJEWSKA, J. (2005). European Social Charter Practice: Legalism of Common Sense? *Polish Quarterly of International Affairs*, Vol. 14, pp. 45-65.
- SÂMBOAN, C. (2013). The role of the European Committee for Social Rights in the European System for the Protection of Human Rights. Interactions with the ECHR Jurisprudence. *Perspectives of Business Law Journal*, Vol 2, pp. 228-233.