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Guarantee of the social rights by the Council of Europe: a bulwark against the crisis

The contribution of the European Social Charter

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Your Excellencies, ladies and gentlemen, distinguished colleagues.

Since my task is to present the contribution of the European Social Charter, as a guarantee for the protection of social rights in Europe, in our times of economic crisis and way-out of the crisis, I would immediately say, putting aside any false modesty, that this contribution has been, and will continue to be - I hope -, an important and positive contribution.

This should not be very surprising; it is quite the opposite, indeed.

In fact, when talking about the European Social Charter one should always remember something that is well known, of course, but which is not considered enough when assessing the kind of contribution, the role played in Europe, by the system of the Charter.

I precisely refer to the fact that the European Social Charter – which is at the very centre of the "Turin process" – is, at the international level, the most wide-ranging and comprehensive legal instrument for the protection of social rights. The 31 substantive articles of the Revised Charter cover a broad range of individual and collective rights, spanning across many social areas. Among such rights, employment rights – including the right to work and to employment, the rights at work and the right to decent working conditions with respect to pay, working hours, holidays and dismissal protections, as well as the collective rights of workers to organize, to bargain collectively and to form and join trade unions – represent certainly one of the main pillars of the Charter, probably the most traditional one. And social protection is another traditional pillar of the Charter; the Charter addresses indeed all aspects of social protection: it provides for the right to social security in its various branches, such as pensions, sickness cover, unemployment benefits,

occupational accident insurance and family benefits; and it guarantees an enforceable right to social and medical assistance for persons in need.

But the Revised Charter goes far beyond employment rights, labour rights and social protection; it provides an overarching approach to what are known today as "societal" issues. I refer, for example, to the right to protection of health, the right to housing, the protection of the family, the protection and education of children and young persons, the right of persons with disabilities to social integration and participation in the life of the community, the right to protection against poverty and social exclusion (which requires States to adopt a global and coordinated approach to fighting poverty and social exclusion).

Therefore, from the standpoint of persons protected, it is correct to say that the Charter, more than any other international (and European) normative instrument, takes care of the essential social needs of individuals in their daily lives; and the common rationale of all its provisions is the assumption that human beings must have the right to enjoy decent living conditions as members of the organized community in which they live: conditions such as to allow for them to live in dignity, rather than merely survive. At the same time, from the standpoint of the political and legal commitment required by States Parties, it can be said that the European Social Charter, more than any other international instrument, pushes States to provide themselves with an advanced and efficient public welfare system, and to guarantee social justice.

If I have recalled these basic features of the system of the ESC is clearly not to give any special credit to the European Committee of Social Rights, which is only the quasi-judicial monitoring body of the Charter, but rather to give all the due credit to the States that have created it and brought it into being, making such system for the protection of social rights a cornerstone, together with the European Convention of Human Rights, in the construction of the European civilization of human rights, democracy and rule of law.

The task of our Committee is precisely to control and assess, from a legal standpoint, the compliance with the obligations that States themselves have assumed to respect social rights, in order to guarantee that respect for social rights will continue to be not just an original, historical – I would say – cornerstone, but an actual cornerstone in the living European legal, political and social construction.

With this in mind, it is easy to explain and understand what has been in the last years, and still is, the approach, the response of the Charter system to the economic and financial crisis, and to the

measures or policies that have put in place to answer to the crisis, in particular with regard to the area of labour rights and social protection.

In fact, in these years, our continuous effort has essentially been to warn Governments and State authorities that economic crisis and austerity measures are very likely to have, and indeed are having, a negative impact on the level of protection and actual enjoyment of the rights enshrined in the Charter. And when this has actually occurred, we have not missed the opportunity to assess and stress it, by clearly stating – first – that adopting given policies and measures, or the lack of certain policies and measures, is not in conformity with the commitments to protect and guarantee social rights that States have assumed under the European Social Charter, and – second – by recalling, from a strictly legal point of view, that this amounts to a violation of international legal obligations imposed on States by a binding European treaty. Furthermore, we have always done this, irrespective of whether the legislation or practice to be assessed was adopted "unilaterally", by a given State, or – differently – it was induced by, or was due to, a decision of EU institutions or the so-called Troika.

Let me start by recalling that in 2009, which means at the beginning of the economic-financial crisis, the Committee took immediately the opportunity to make a statement, in the General Introduction of its Conclusions, about implementation of the Charter in the context of the economic crisis. The Committee emphasised that the crisis had already had, in 2008, significant implications on social rights, and notably that "increasing levels of unemployment is presenting a challenge to social security and social assistance systems, as the number of beneficiaries increase while tax and social security contribution revenues decline." On that occasion, the Committee also underlined that, under the Charter, "the Parties have accepted to pursue by all appropriate means, the attainment of conditions in which *inter alia* the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realized". On this basis the Committee stated that "the economic crisis should not have as a consequence the reduction of the protection of the rights recognized by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most."

Unfortunately, the Conclusions of 2013 and 2014 are testimony that worries and fears expressed in 2009 were well founded, and that the intended effect of the Committee's statement has not been fully realised. On the contrary, the proportion of violations is higher now than in 2009; and violations are increasingly linked to inadequate levels of social security benefits and social

assistance benefits, which disproportionately affect those who are most vulnerable – the poor, the elderly, the sick. But they are also linked, for example, to a decrease in lowest wages paid, or in the level of statutory minimum wages considered in comparison with the average wage. The conclusions of the last two years also reflect that health care systems are under growing pressure from austerity measures and there are signs, at least in some countries, that protection of health and safety at work is being downgraded, notably in small and medium-sized enterprises.

As an example of this worsening situation, let me refer to the right to social and medical assistance, which is provided for by art. 13 §1 of the Charter. Well, social and medical assistance for persons in need and with no resources is indeed a crucial safeguard against poverty, and a fundamental social right; which makes it all the more striking and a cause for concern that no fewer than 25 out of 31 countries examined in 2013 were found by us to be in breach of this provision. And the large majority of the violations concerns inadequate levels of social assistance. On this point, let me recall that the Committee holds that public assistance should not condemn beneficiaries to (income) poverty and that cash benefits, including any supplements, therefore should not fall below 50% of median equivalised income (which is the poverty threshold as applied by the Committee). And an increasing number of States Parties, both EU and non-EU, fail to meet this threshold.

Another example is the right to a fair remuneration, under article 4 §1 of the Charter which guarantees the right to a remuneration such as will give workers and their families a decent standard of living. It is the Committee's case-law that, in order to ensure a decent standard of living, the lowest net wages paid must be above a minimum threshold, set at 50% of the net average wage. In 2014 the Committee found that, whilst few States in Europe meet this minimum threshold in some sectors (for example the private sector, or the industries covered by collective agreement), or for specific types of workers, the large majority of States, EU and non-EU States, completely fail to meet such threshold, either in the private or in the public sector.
So, in this case, our contribution, so to say, has consisted in highlighting and stating that States should not tolerate that, as a consequence of their legislation or of the labour market dynamics, workers are remunerated for their work by wages which, considering the cost of life, are so inadequate, such as they do not guarantee workers and their family their means of subsistence, sometimes determining that entire categories of workers fall below the poverty threshold.

But probably the best and most known examples of the contribution of the system of the European Social Charter to the protection of social rights in the context of economic crisis and austerity

measures come not from our Conclusions of the last years, but from the Collective Complaints procedure.

In 2012 the European Committee of Social Rights has in fact decided seven collective complaints against Greece, concerning a series of legislative measures adopted by this State to fulfil the requirements decided by the so-called Troika as preconditions for the loan instalments, in the context of the financial support mechanism agreed upon by Greece with the Troika in 2010. These measures were supposed to enhance competitiveness of the Greek economy, combat unemployment by enhancing flexibility and encouraging employers to take a staff, and they were also aimed at cutting the financial cost for Greece of both public and private pensions schemes.

Two of such complaints (65/2011 and 66/2011) were lodged together by the General Federation of Employees of the National Electric Power Corporation and the Confederation of Greek Civil Servants, and concerned some measures reforming the labour market, labour contracts and wage conditions. In particular, the Greek legislation introduced "special apprenticeship contracts" for young persons aged between 15 and 18 years which, according to the Committee's assessment, are excluded from the scope of labour legislation and have the practical effect of establishing a distinct category of workers who are not entitled, for example, to the annual three-weeks leave with pay, and who are excluded from the general range of protection offered by the social security system. In addition the Greek legislation adopted a reduction of 32% of the minimum wage, which has been applied to all employed persons under the age of 25, so that the minimum wage for younger workers is now substantially below the national minimum wage and has fallen below the poverty threshold. Other provisions of the same legislation made it possible, in the context of an open-ended labour contract, to dismiss a person without notice or compensation during an initial probation period of twelve months.

The Committee clearly stated that all these changes are not compatible with the obligations to protect social rights under the European Social Charter, and in particular with the provisions establishing the right of workers to annual holyday with pay, the right to a decent pay, the right to reasonable notice of termination of employment, and the obligation of the State not to deteriorate the social security schemes.

The other five complaints against Greece (76/2012, 77/2012, 78/2012, 79/2012, and 80/2012) were lodged by pensioner's Unions, and concerned a series of legislative acts which suspended all pensions payments, reduced the amount of pensions, by 40, 50 or even 70 % in some cases, and reduced the social solidarity benefit of private sectors pensioners, by drastically lowering the income ceilings on which the benefit is paid.

It is worth stressing that, in the reasoning of the decisions of such complaints, the Committee started by recognizing that reductions in the benefits available in a national security system do not, *per se*, automatically, constitute a violation of the Charter's obligation to maintain the social security system on a satisfactory level, and that restrictions or limitations to rights in the area of social security can be compatible with the Charter in so far as they are necessary to ensure the maintenance of a given system of social security; and that the consolidation of public finances, in order to avoid mounting deficits and interest, constitutes indeed a means of safeguarding the social security system.

However, in the specific cases, the Committee considered, first, that the cumulative effect of the restrictions adopted by Greece was bound to bring about a significant degradation of the standard of living and the living conditions of many of pensioners concerned, and – second – that the Government did not conduct the minimum level of research and analysis neither into the effects of such far reaching measures nor into their full impact on vulnerable groups in society.

In this respect the Committee, recalling also the jurisprudence of the Court of human rights, held

"that any decisions made in respect of pension entitlements must respect the need to reconcile the general interest with individual rights, including any legitimate expectations that individuals may have in respect of the stability of the rules applicable to social security benefits".

The Committee concluded that "the restrictive measures at stake, which have the effect of depriving one segment of the population of a very substantial portion of their means of subsistence, have been introduced in a manner that does not respect the legitimate expectation of pensioners that adjustments to their social security entitlements will be implemented in a manner that takes due account of their vulnerability, settled financial expectations and ultimately their right to enjoy an effective access to social protection and social security".

And the Committee has also added, significantly in my view, that

"doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis, but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems, particularly social assistance".

Outside the framework of the Greek situation and the economic crisis, another significant example of the primary importance given by the Committee to the protection of social rights, and in particular labour and trade unions rights, even when such rights have to be balanced against valuable economic freedoms, such as the freedom to provide services abroad, is the decision of Complaint 85/2012 against Sweden, adopted on July 2013.

This complaint concerned the adoption by Sweden of the so-called Lex Laval, as a consequence of a preliminary ruling of European Court of Justice. The new legislation, which took the place of the previous Lex Britannia, was in fact considered necessary in order for the Swedish legislation to comply with EU law on freedom to provide services, as interpreted by the Court of Justice in the *Laval* ruling, of December 2007.

To cut a long story short, the problem here was that this legislation, as regards foreign posted workers, had imposed substantial limitations on the ability of Swedish Trade Unions to make use of collective action in establishing collective agreements on matters which go beyond the minimum rate of pay or other minimum conditions. The same legislation also considers to be admissible to grant posted workers minimum standards, equivalent to those enjoyed by national workers without occupational experience at all (such as young people), even when the foreign posted workers have a long occupational experience and professional skills.

The Committee therefore could not but find that the new Swedish legislation is in contrast with the European Social Charter, and in particular with the provisions establishing the right to bargain collectively and the right to strike (art. 6§2 and 6§4), as well as the obligation of the State to guarantee foreign workers treatment not less favourable than that of national workers respect to the remuneration and enjoyment of the benefits of collective bargaining (art. 6§4).

But what deserves to be stressed is that the Committee, in deciding this case, took the opportunity to clarify something that is very important from the perspective of the protection of labour rights and the right to collective bargaining and collective action. Let me quote the relevant passage of the decision:

"The Committee considers that legal rules relating to the exercise of economic freedoms established by State Parties either directly through national law or indirectly through EU law should be interpreted in such a way as to not impose disproportionate restrictions upon the exercise of labour rights as set forth by, further to the Charter, national laws, EU law, and other international binding standards. In particular, national and EU rules regulating the enjoyment of such freedoms should be interpreted and applied in a manner that recognises the fundamental importance of the right of trade unions and their members to strive both for the protection and the improvement of the living and working conditions of workers, and also to seek equal treatment of workers regardless of nationality or any other ground.

Consequently, the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied

in the Charter, as having a greater a priori value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers. In addition, any restrictions that are imposed on the enjoyment of this right should not prevent trade unions from engaging in collective action to improve the employment conditions, including wage levels, of workers irrespective of their nationality".

Having recalled the recent developments of the jurisprudence of the European Committee of Social Rights concerning the protection of social rights at our times of economic crisis and austerity measures, I come now, very briefly, to the other issue raised by the background paper of this conference, that is whether the Committee and the Social Charter system are equipped, or not, to address issues that concern fundamentally the soundness of macro-economic policies put in place to deal with the crisis.

In this regard, let me say that if the perspective of this conference and the main interest for all the participants, for all of us here, is assessing the future of social rights in Europe, and contributing to ensure that all citizens can actually enjoy fundamental social rights in their everyday lives, then the very question is not so much, in my view, whether the Social Charter system is equipped or not to take into consideration the soundness of macro-economic policies put in place to way-out of the crisis and facilitate economic growth. The issue at stake is rather that certain macro-economic policies, certain austerity and labour market measures, which are considered necessary to address the crisis, can have a negative impact on social rights. Therefore, the very question is whether States, governments and European institutions competent in dealing with the crisis and in adopting macro-economic policies and other measures to cope with the crisis, are sufficiently equipped to address such issues in a way not to jeopardize or violate social rights.

And in the light of the Conclusions and Decisions of the European Committee of Social Rights of the last years, the answer to this question seems to be that European States and European institutions, like the EU institutions, are not always sufficiently equipped to do so.

In this respect, and considering the question from my specific point of view, that is the standpoint of the quasi-judicial monitoring body of the European Social Charter, some suggestions - or wishes - could be proposed to your attention, with a view to improving the equipment of States and European institutions, necessary for an adequate respect of social rights, also when they have to deal with policies and measures to address serious economic and financial crises. They are, moreover, suggestions that have already been presented and discussed in the context of the Turin High Level Conference of October 2014, and very well emphasized in the Report submitted by Mr

Nicoletti, General Rapporteur of that Conference. Some of them have also been recalled this morning by the Secretary General of the Council of Europe, Mr Jagland, at the very opening of this Conference.

The first suggestion is the ratification of the Revised European Social Charter by all those States of the Council of Europe – some among them are also member States of the EU – which are still bound by the "old" Charter of 1961.

My second suggestion would be the ratification of the Protocol on Collective Complaints by those States parties to the Charter that have not yet ratified it; together with a strong enhancement of the collective complaints procedure, which – as you know - allows the direct involvement of social partners and civil society in monitoring activities regarding the application of the Charter.

And a third suggestion is reinforcing dialogue and exchanges with competent bodies of the European Union – in particular the Parliament, the Commission, the Economic and Social Committee, and the Court of Justice – , in view of a more careful consideration of the European Social Charter within the EU decision-making process and the judicial interpretation of EU law.

But apart from and beyond any specific possible suggestion or wish, and to conclude my intervention, I am firmly convinced that if we all – and I mean national authorities, legislators and judges, European political and judicial institutions and bodies, but also Trade Unions, NGOs and other stakeholders from the organized civil society – if we all will take a bit more seriously the European Social Charter and its substantial contents, I really believe that the future of social rights in Europe, even if it will not magically become a brighter and rosy future, nevertheless can surely become less problematical and uncertain than their present is being, in these challenging times of economic crisis and way-out of the crisis.

Thank you.