REFORM OF THE EUROPEAN SOCIAL CHARTER

Seminar presentations

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Reform of the European Social Charter

Seminar presentations

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Foreword

Are human rights created to defend human freedom and the opportunity to participate in societal activities, or do they intend to also protect the citizens' basic needs of employment, livelihood, housing, health and social care at times when own resources are not enough? This has been the subject of public debate across Europe throughout the period of the construction of welfare states.

Now, when economic development seems to be constricting the development of welfare more than before, the connecting factors of civil and social rights, i.e. their indivisibility and interdependence, are strengthened and are given general acceptance. All the human rights monitoring bodies of the Council of Europe defend both of these rights, and the European Union has included both civil and social rights as binding rights (since 1 December 2009) in the Charter of Fundamental Rights and Freedoms.

Considering that the European Social Charter reaches 50 years of age in October, the Finnish Ministry of Foreign Affairs decided to celebrate the anniversary by organising an international festival seminar on 8 February, in the House of the Estates, Helsinki. The seminar was aimed at looking into the future decades and, in particular, at reflecting on social rights and on their monitoring in the future.

The event was opened by the President of the Republic of Finland, Ms *Tarja Halonen*. Welcoming address was presented by Ms *Maud de Boer-Buquicchio*, Deputy Secretary General of the Council of Europe. Speakers included representatives of the key human rights organisations, the Council of Europe, the International Labour Organisation, as well as NGOs and representatives of the University of Helsinki, whose presentations make up the first chapter of this book. The event was chaired by Ambassador *Irma Ertman*.

The University of Helsinki's Faculty of Law held a postgraduate academic seminar the next day, 9 February, at the University's main building. The aim was to examine the current state of social human rights and also to pinpoint drawbacks in their achievement.

This event also managed to attract several leading European and national experts as speakers. All the related presentations that the editors could include before printing are in the second chapter of this book. This second-day seminar was co-chaired by Academy Professor *Kaarlo Tuori* and Professor *Jarna Petman*.

I thank the President of the Republic and Madam Deputy Secretary-General for their valuable contribution to the success of the event and all the chairmen of

seminars, speakers, active participants, event organizers, as well as the writers and editors of this publication for their remarkable contribution to a good cause, which also served as an opening of a series of international seminars in this anniversary year.

29 June 2011, Helsinki

Sofie From-Emmesberger
Director, Unit for Human Rights Policy
Ministry for Foreign Affairs of Finland

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Opening words

Ms Tarja Halonen
President of the Republic of Finland

Last autumn marked the 60th anniversary of the European Human Rights Convention. This year we celebrate the fifty years of the European Social Charter.

At the time of the creation of the Social Charter in 1961, many European countries were just taking the first steps in their efforts towards building a welfare state. The Charter set the common minimum standards and also constituted an agreement on the guidelines for higher standards and strengthened the common European value base. The Social Charter solidified equality and solidarity towards our fellow human beings as shared European values.

The Human Rights Convention and the Social Charter were among the first legally binding human rights treaties, leading the way for the rest of the world. At the time, Finland was not yet able to participate in the drafting of either of these documents, but was among the first countries to ratify the corresponding UN conventions drafted in 1966. Finland has also made every effort to foster the realisation of both European and universal human rights. For this reason, we are especially delighted and honoured to be able to organise this international seminar marking the 50th anniversary of the Social Charter.

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In recent years some have questioned the need for a European human rights framework, or the need for the Council of Europe for that matter. After all, we have the European Union! I have often answered saying that Europe needs both the Union and the Council. The former is an economic and political union of 27 countries. The latter is an organisation promoting the interests of the ordinary citizens; its jurisdiction is not limited to 27 countries, but covers 47 nations and 800 million people in an area extending from Reykjavik to Vladivostok.

The fact that the Council of Europe in practice covers all of Europe is important not only for the individuals, but also for the European states and their unions. It is equally important that all 47 countries are committed to the European Human Rights Convention and that 43 of them are also committed to the European Social Charter. Together these two legal documents, key to human rights in Europe, provide protection for 98 per cent of the citizens of our continent.

I am delighted that, after lengthy debate, we finally have full justification for examining civil, political and social rights as a coherent entity.

By 1991, when Finland became the eighteenth country to commit itself to the European Social Charter, the treaty had already reached thirty years of age. Nonetheless, it remained an unknown – or, as the expression went, invisible – document to many of the countries that had already ratified it. Not one single country up to that time had been reprimanded for deficiencies in legislation or practices.

This year, as we celebrate its fifty-year journey, this significant document has become a functional and recognised international treaty, and one of the cornerstones of European social justice. It has become a model adopted by other continents, including the Americas and southern Africa with the Social Charter of the Americas, and the Charter of Fundamental Social Rights of the South African Development Community. Northern Africa and western and southern Asia are in the process of following this example.

As we who are here today all know, the European Social Charter had an essential impact on the drafting of the EU Charter of Fundamental Rights agreed in Nice in 2000. For this treaty the standards were mainly adopted from the Revised Social Charter of 1996. This was in spite of the fact that not all EU Member States had committed themselves to it at that point, nor have all Member States yet done so today. In any case, as it became part of the Charter of Fundamental Rights of the European Union, many of the rights of the Social Charter became part of EU justice. The Treaty of Nice was adopted as part of the Treaty of Lisbon, which in turn made these norms binding on 25 EU countries from 1 December 2009.

The fact that the Council of Europe and the EU have a largely coherent foundation of social norms, sets particular challenges for the bodies monitoring compliance with the treaties, and for the organisation of their mutual relationship. Monitoring of the Human Rights Convention is the responsibility of the European Court of Human Rights, while that of the Social Charter belongs to the European Committee of Social Rights. Monitoring of the EU's fundamental rights is the responsibility of national courts of law and, ultimately, of the Court of Justice of the European Union. Three largely overlapping regulations and three supranational monitoring systems.

It is more than important to be aware of, and know, what the other monitoring bodies are doing. An optical cable enabling the real-time monitoring of each other's decision-making would be needed between Strasbourg and Luxembourg. Even though the Council of Europe and the EU may, as organisations, have differing policy objectives and operating ideas, their jurisdiction should share the same direction. The idea of the key administrators of justice reaching differing

conclusions on similar matters would be difficult for citizens to understand. To date, this has not happened, nor should it happen in future.

* * *

In 1998, I had the opportunity of participating in a group of five persons, chaired by Mr Mario Soares, long-time Prime Minister of Portugal, tasked with outlining the imminent development measures of the Council of Europe. The organisation had doubled its membership within a short period of time and was now faced with the need to reform its structures and procedures. We made a number of proposals to that end.

For example, we considered it important that the independence of the court system in relation to the executive power to be developed in all member states. We also considered that dialogue between international monitoring bodies and national bodies as well as coordination among international monitoring bodies be increased.

What has been most memorable for me, however, is the general demand noted in the introduction to our report, according to which the primary task of the Council of Europe in the converging and globalising market should be the protection of those who have been placed in a vulnerable position: "globalisation without poverty". In the Millennium Summit in 2000, the United Nations placed poverty eradication and social justice at the centre of its development efforts. The notion of protecting the vulnerable party is recorded in several places in the Social Charter, and it is this very notion that we need to bear in mind today in the further development of the Council of Europe.

So, what could these future steps be?

The first important step is already being taken. The accession of the European Union to the Human Rights Convention has been under preparation for some time and is likely to emerge as a subject of political decision-making in the near future. This inevitably leads to a follow-up question: should the EU also consider accession to the European Social Charter?

This thought could even be elaborated further: why continue with two treaties in the first place? The EU has successfully combined civil, political and social rights under a single treaty; could the Council of Europe codify the current two treaties as a single treaty? This could be linked to a discussion on the third generation rights that should be included in a coherent European Human Rights Convention.

The codification of regulations does not mean that the special characteristics of social rights should be faded out altogether. Their collective and dynamic nature can, and should, be preserved in future. However, where the question is one of fundamental survival, social rights could, and should, also be safeguarded as individual rights.

The right to submit complaints has been extended, by both the UN and the ILO, from organisations to individuals. A similar reform in the monitoring practices of the Council of Europe might be the first step towards the convergence of the monitoring systems for civil rights and social rights within the Council.

In the long term, the monitoring of the realisation of human rights in Europe should take place through a more harmonised system than exists today. This is why all steps in that direction should be considered progress. Strengthening the Secretariat in charge of monitoring social rights, enabling the submission of complaints by individuals, and promoting the expertise and independence of the monitoring committee, are all efforts geared towards increasing the efficiency of the monitoring of social rights, and bringing them closer to the monitoring of civil and political rights. The accession of the European Union to the Social Charter would also support development in that direction. Altogether, these would be the first steps on the road towards a coherent European human rights framework.

In the era of sustainable development and globalisation, we need to pay special attention to social justice. I hope that we Europeans could also in the future be proud of the fact that our continent is a forerunner in the implementation of democracy and human rights.

Welcome address

Ms Maud de Boer-Buquicchio
Deputy Secretary General of the Council of Europe

The drafters of the Charter, taking the Universal Declaration of Human Rights as their point of departure, ambitiously set out to create a fully-fledged counterpart to the European Convention on Human Rights. However, when the Charter was finally adopted in 1961 after a decade of difficult negotiations, it consecrated a split between civil and political rights on the one hand and economic and social rights on the other. The treaty adopted was only a faint shadow of the Convention, with "à la carte" acceptance of provisions, restrictions on the personal scope and a rather weak supervisory mechanism.

In its first incarnation, the Charter was thus the proverbial "sleeping beauty", having little impact on the law and practice of the States Parties and even less visibility for the public at large. It was only after 1989 following the revolutions in Eastern Europe that a political consensus to elevate the status of social rights finally emerged; a consensus which made possible the adoption of the Revised Charter and a strengthening of the supervisory mechanism, notably through the collective complaints procedure. As a result of these reforms, the Charter in the 1990s began to emerge as a real counterpart to the Convention and as an instrument with the capacity to advance social justice even in times of profound economic change.

The fact that the reform of the Charter has been a success in many respects, that it is today an effective pan-European human rights mechanism, should not give us cause to rest on our laurels. Much lip service is being paid to the principle of the indivisibility of human rights, but its implementation in practice is still a distant prospect. While the Revised Charter and the collective complaints procedure represent milestones in the protection of social rights, there is still much work to be done before the enforcement of these rights can even begin to compare with that provided in respect of civil and political rights.

The foundational values of the Charter, such as human dignity and solidarity, non-discrimination and participation, imply that as part of a community we owe more to each other than just 'not to interfere'. In other words, we have positive obligations to secure education, just working conditions and fair remuneration for all, to provide social and medical assistance to those who need it, to guarantee affordable housing, to eradicate all forms of discrimination in the enjoyment of social rights, and so on. Only by meeting these basic Charter obligations can we

bring about "deep" security throughout Europe. That is the message that must be taken on board by European political leaders.

With this in mind, I am particularly pleased that the Finnish Government has taken the initiative to mark the Charter anniversary, not merely through ceremonial incantations of past achievements, but by launching a necessary reflection on how we can strengthen the impact of this treaty which is of paramount importance to Europe. In particular, the aim would be to consider institutional and procedural innovations that could receive the rapid and unanimous support of the States Parties, if possible without the need for actual treaty amendments, and ideally so that the Committee of Ministers could take the requisite decisions already this year.

I would like to thank President *Halonen* and Ambassador *Ertman* for their personal involvement and commitment in making this event happen and I look forward to hearing the ideas and proposals of the distinguished keynote speakers today. However, if you don't mind, I will "abuse" my position to briefly share with you some suggestions on how to make the Charter more politically relevant – in line with the reform objectives of the Council of Europe, and more visible to the citizens of Europe:

- The collective complaints procedure must be promoted further: acceptance of this procedure, which is so intimately linked to democracy and the rule of law should be regarded as a priority by any European democracy. The procedure has not only opened up for a much more active involvement of the social partners and civil society in general, it has also profoundly changed the role of the European Committee of Social Rights. The Committee now acts as a quasi-judicial body judging the conformity of national law and practice, using increasingly judicial methods and demonstrating that social rights can be justifiable. In this respect it might, by the way, be appropriate to implement the only provision of the Turin Protocol that is still not being applied in practice, namely election of Committee members by the Parliamentary Assembly. That would further accentuate the status and visibility of the Committee.

Moreover, this mechanism has proven particularly useful to seek remedies to the violations of the rights of vulnerable people such as children, migrants, Roma or people with disabilities.

Finally, although perhaps an accessory argument, it should not be ignored that the collective complaints procedure has potential to alleviate Court's case load by resolving difficult social issues of a general or systemic nature (before they become the topic of countless individual cases before the Court).

So clearly, the collective complaints procedure is an absolute priority. I am however confident that the time will come to seriously consider the possibility of

allowing individuals to lodge complaints against violations of their economic and social rights. This is already the case at the UN level, thanks to the introduction of an individual procedure through the Optional Protocol to the Covenant on Economic, Social and Cultural Rights.

The reporting procedure with its continuous and systematic monitoring of national situations has shown its worth, especially since the early 1990s, and its combination with the collective complaints procedure makes the Charter mechanism truly unique in international law. Nevertheless, there is a need to strengthen the impact and political relevance of the Committee's annual conclusions and not least to ensure a wider dissemination of these conclusions at the national level. Adapting the existing methods of examining national reports might be a means to achieve the necessary progress in this respect.

More specifically, it could be envisaged that the ECSR concentrate its examination on situations of major significance, either because they raise manifest problems of conformity or because they relate to important evolutions in the way social rights are applied in the countries concerned. It seems to me that vesting in the European Committee of Social Rights the responsibility for a more selective and targeted approach would make for politically more incisive conclusions and for a more rational use of the limited resources of the Committee and its Secretariat.

I am fully aware that these suggestions only scratch the surface, that they are perhaps not all equally realistic, at least within a 2011 time frame, and that there may be more than a few other proposals which are deserving of our attention. However, it is essential that we arrive - and that we arrive soon - at a political upgrade of the Charter so as to place social rights not only at the heart of the Council of Europe's mission, but also at the heart of the ongoing reform of this Organisation. That is yet another reason why I have high expectations for our discussions at this conference. I consider it crucial that already today we succeed in laying the groundwork for a new Charter reform process - it therefore goes without saying that I wish this conference all possible success.

The European Committee of Social Rights and the collective complaints procedure: present and future

Mr Luis Jimena Quesada
President of the European Committee of Social Rights

I feel very honoured to participate in this seminar and wish to express my gratitude to the Finnish authorities for their initiative on the occasion of the 50th anniversary of the European Social Charter to launch a constructive reflection on the future of this treaty and its supervisory mechanism. The initiative of Finland is certainly in line with its longstanding commitment to the Charter: as we know, Finland was among the first countries to ratify the Revised Charter and the collective complaints procedure and it is the only country having recognized the competence of national NGOs to lodge collective complaints.

My presentation will focus on two aspects: firstly, the present status of the European Committee of Social Rights in the light of the collective complaints procedure and the real impact of this mechanism in terms of effectiveness of social rights; and, secondly, some proposals for strengthening the Committee's judicial profile while improving the visibility of the system of collective complaints. In both cases, I will take a comparative approach and try to situate the Committee and the complaints procedure in the international human rights framework.

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What is, therefore, the current situation of the Committee and how is the Committee perceived?

The collective complaints procedure has profoundly changed the image of the Committee, whose functions are becoming more and more judicial. The independence and impartiality of the Committee and of its members, its methods of interpretation, the format of its decisions, the external impact of its case law and the examples of implementation of its decisions confirm this increasingly judicial image.

The non-permanent status of the Committee and its members is not necessarily a barrier to its judicial dimension, especially if we consider the support given by the Secretariat of the Committee. It is worthwhile recalling that the European Court of Human Rights was not permanent until the entry into force of Protocol No. 11, and the Inter-American Court of Human Rights, which has a limited competence in the field of social rights, especially through the 1988 San Salvador Protocol, is still not permanent.

The collective complaints procedure is adversarial in nature and guarantees due process of law. It also provides for the possibility of holding public hearings. By the end of 2010, 63 complaints had been registered (since the entry into force of the procedure in 1998). The average duration of the admissibility stage was 4-5 months, while the average duration of the phase on the merits was less than 11 months. This represents a very reasonable duration of the procedure. Unfortunately, it is evident that in many cases, including cases of serious violations of fundamental rights, it may take a substantial amount of time before actual measures are taken to remedy the situation.

The increasing number of collective complaints is the result of the still more active involvement of trade unions and civil society organizations. Organizations entitled to intervene in the collective complaints procedure have a crucial role to play in filing serious complaints that, in turn, induce the respondent governments to take a serious approach and to provide pertinent responses.

The interpretative methods and techniques used by the Committee have also reinforced its judicial image. These methods and techniques of interpretation are similar to those used by the European Court of Human Rights (positive obligations, national discretion in the manner the obligations are implemented, non-discrimination clause, attention to other international human rights instruments, etc.). As a result, the Committee's decisions, which are of a binding character, generate greater acceptance and compliance by States Parties.

The impact of the case law of the Committee has increased considerably. For example, the European Court of Human Rights referred to the Committee's work in important cases revealing synergy or convergence of reasoning (*Judgment Sørensen and Rasmussen v. Denmark* of 2006) or in cases involving an evolutive interpretation of the European Convention on Human Rights in line with the Charter (*Judgment Demir and Baykara v. Turkey* of 2008).

Correspondingly, in developing its case law, the Committee is often inspired by the case law of the European Court of Human Rights, the Court of Justice of the EU, in some cases, as well as the judgments of the Inter-American Court, the General Comments of the UN Committee of Economic, Social and Cultural Rights and the work of the ILO Expert committee.

This shows a mutual enrichment in the context of a global judicial dialogue in which the Committee participates. The Committee also systematically takes into consideration the work done by other institutions and monitoring bodies, especially those within the Council of Europe (Commissioner for Human Rights, ECRI, etc.).

In addition, it should be noted that the practice shows significant examples of national implementation by *legislative authorities* (*European Roma Rights Centre v. Bulgaria*, Complaint No. 48/2008: amendment of the Social Security Act to

prevent suspension or suppression of access to unemployment benefits to people in precarious situations), *executive authorities* (*Interights v. Croatia*, Complaint No. 45/2007: withdrawal from the educational system of textbooks containing discriminatory statements on the grounds of sexual orientation) or *judicial authorities* (*International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003: enjoyment of the right to medical assistance by children of illegal immigrants).

These examples give visibility and credibility to the work of the European Committee of Social Rights and they demonstrate that the Charter is a binding and living instrument.

However, it is necessary to take further steps in order to improve the follow up of the decisions taken by the European Committee of Social Rights to ensure their proper and actual implementation.

* * * * *

Now, what ideas or proposals for the future could be made?

The position of the Committee and its members could be strengthened by giving the members a permanent or semi-permanent status (at least, in respect of some of its members: for example, members of the Bureau); this would allow them to cope with their increasing and increasingly complex workload.

In parallel, it is obvious that the status of the staff of the Secretariat should be improved in qualitative terms (professional consideration through a grading that corresponds to their real responsibilities) and in quantitative terms (more staff are indeed needed).

It is true that the most important part of the workload derives, for now, from the reporting system. The reporting procedure has played and continues to play a key role in ensuring compliance with the Charter. Nevertheless, the collective complaints procedure deserves special attention in the international framework for protection of human rights.

In fact, any reform of the Charter will largely depend on the success and further development of the collective complaints procedure and the decisive factor in this respect will be whether this procedure is accepted by more countries.

While the transition from the 1961 Charter to the 1996 Revised Charter by all States is very important (13 States are still Contracting Parties to the 1961 Charter and already 30 are Parties to the 1996 Revised Charter), the main priority should be the acceptance of the collective complaints procedure.

I share the common belief that the success of the European Social Charter lies in the existence of an effective control mechanism. Therefore, one of our main

challenges consists in convincing more Member States of the Council of Europe to accept the complaints procedure either through ratifying the 1995 Protocol or by making a declaration in conformity with Article D of the revised Charter.

I also want to recall that States which have not accepted the procedure are nonetheless affected by the decisions of the Committee in complaints, since the Committee's case law elaborated in the context of this procedure is subsequently applied in the context of the reporting system, and thus binds all States Parties to the Charter. Furthermore, States which have not accepted the collective complaints procedure system are not invited to participate in the proceedings which are restricted to the 14 countries bound by the procedure, and they are thus largely deprived of the possibility of having an input.

The indivisibility of all human rights, including social rights, also means the indivisibility of guarantees. The acceptance not only of the Revised Charter, but also of the collective complaints procedure should be required from all the Member States of the Council of Europe, as these instruments reflect the essence of the three pillars founding the organization: *rule of law, democracy* and *human rights*.

In order to enhance the status of the Committee and its members, it is further my view that members should be elected by the Parliamentary Assembly (as it is the case for the judges of the European Court of Human Rights). This is in fact foreseen by the only provision of the 1991 Turin Protocol which is not yet in force. In addition, consideration should be given to adopting a system whereby qualified candidates are pre-selected akin to the system that is in place for the election of the judges of the Court of Justice of the EU.

In addition, one could envisage the possibility of replacing the system of a six-year term, renewable once, by a nine-year term non-renewable, similar to that established by Protocol No. 14 in relation to the European Court of Human Rights.

New developments at the universal level, in particular, the adoption of an individual communication system under the International Covenant on Economic, Social and Cultural Rights through the 2008 Optional Protocol requires, once again, that consideration be given to introducing a mechanism at the European level allowing individual applications in matters of social rights, either before the Committee or before the Court.

Nevertheless, the aim of the current process of reform in the context of the 50th anniversary of the Charter must be to strengthen the collective complaints procedure.

This procedure has an important preventive nature, since it allows for a very speedy treatment of the situations at stake. Moreover, the Committee’s intervention is characterized by a global approach without victim requirements and necessity of

exhausting domestic remedies and it thus has potential to avoid a multitude of individual applications to the Court.

This argues in favour of further developing the links between the European Committee of Social Rights and the European Court of Human Rights, stressing once again the indivisibility and complementarity of the organs of the Council of Europe: cases declared inadmissible by the Court which concern social rights could be redirected to the Committee, e. g. suggesting to the applicants that their application could be transformed into a collective complaint.

In practice, contacts, institutionalized or informal, between the Court and the Committee, and/or between their respective Registry/Secretariat are important and may lead to a positive and successful outcome.

These types of synergies should also continue to be developed and extended to other jurisdictions or bodies in the international human rights framework; in the European context, notably in relation to the Court of Justice of the EU.

Finally, the reform of the Charter implies improving the visibility of the collective complaints mechanism, especially in terms of better publicity and execution of the decisions adopted by the European Committee of Social Rights:

- Firstly, the deadline of four months to make public the decisions on the merits of the Committee is unreasonable, especially when considering that all documents constituting the file of each case are immediately published. Consequently, it should be an institutionalised practice to encourage the countries concerned to publish the report of the Committee without delay. The precedents of other monitoring bodies could be instructive and useful in this respect;
- Secondly, the Committee of Ministers should play a more active political role in the follow up of the monitoring procedure through supervising the implementation of the decisions of the Committee, preferably in a manner that approaches the role which the Committee of Ministers exercises in the framework of the execution of the judgments of the European Court of Human Rights;
- Thirdly, the Parliamentary Assembly, as an ideal forum to raise awareness and debate on social rights, could intensify its consideration of the Charter and the case law of the European Committee of Social Rights when adopting recommendations or organizing promotional activities of the Charter;
- Lastly, the Charter should be a more prominent reference when defining the priorities of the Council of Europe (fight against discrimination, racism, protection of vulnerable target groups, such as Roma communities, children, foreigners, people with disabilities), taking advantage of the wide scope of the Charter and its effective monitoring mechanism.

In conclusion, let me express my hope that the competent decision-making bodies of the Council of Europe will succeed in adopting the appropriate political and institutional decisions in this year of the 50th anniversary of the European Social Charter and that in doing so it will take into account some of the practical proposals and solutions that I have put before you today.

European and global standards and their interaction

Mr Kari Tapiola
Special Adviser to the Director-General, ILO, Geneva

Earlier this morning, the European Social Charter and its follow-up process were characterized as the "Sleeping Beauty". It has also been said at times that the system of international labour standards and their supervision are the ILO's "best kept secret". The fact is that there are more similarities than differences in the rights covered by the European Social Charter and the ILO's standards (also known as the International Labour Code), and many elements are not really well known.

The roots and, mainly, the philosophy of the Charter and the international labour standards are the same. We should remember that at the time of the adoption of the original Charter, the scope of ILO Membership was not yet much broader than the industrialized countries. The reformist social and economic reconstruction effort in the democratic part of Europe coincided with the mainstream tripartite ILO approach. Even today, the differences are very few, and they are due to differences in focus and coverage, as the ILO standards are linked to labour whereas the European social rights are broader.

In percentage terms, 67.7% of the rights covered by both systems are the same. Twelve of the 19 rights covered by the original 1961 Charter are the same. In the revised Charter, out of the twelve new rights, 9 are covered by ILO standards. This would seem to indicate that social rights are increasingly coinciding with labour rights (or, as we also say, rights at work - to remind that the rights belong to both workers and employers).

Another similarity, of course, consists of the principle and the practice of regular supervision. International labour standards and the European Social Charter together constitute a sophisticated high level of supervision, with both reporting and complaints mechanisms. They produce case law and keep the systems both alive and adaptable.

I shall start with some observations on the systems in general.

The system of International labour standards dates to 1919, when five Conventions were adopted at the first session of the International Labour Conference. The Universal Declaration of Human Rights was still 29 years away although many of what we recognize as human rights today were already in the original ILO Constitution - Chapter XIII of the Versailles Peace Treaty.

International labour standards were about "rights at work", or "labour rights". The notion of such standards was conceived at a time when social injustice and the

exploitation of labour were seen to have been at the origins of a devastating world war. The recognition of a certain set of standards as universal human rights, in the United Nations sense, came later on. However, one significant document is the 1944 Philadelphia Declaration, which relaunched the ILO after the Second World War and which today is annexed to the ILO Constitution.

The ILO instruments - Conventions, mainly supplemented by Recommendations and some Protocols - are treaties that aim at regulating labour relations. Conventions and the few existing Protocols become legally binding through ratifications by Member States. Recommendations are often more detailed but not legally binding instructions on how to understand the Conventions.

A number of stand-alone Recommendations are addressed to all Member Countries. They do not entail binding obligations but are subject to supervisory procedures.

Declarations (such as the 1998 Declaration on Fundamental Principles and Rights at Work and its Follow-up or the 2008 Declaration on Social Justice for a Fair Globalization) are not legally binding. They are solemn policy documents which have follow-up procedures; such follow-up, however, is not part of the standards supervisory mechanisms. They are promotional and lend themselves to, among other things, technical cooperation measures.

To give just one example, the largest single technical cooperation programme of the ILO, the IPEC programme on the elimination of child labour, is based on the principles of the child labour Conventions, but it is separate from the supervisory mechanism.

Originally - after 1919 - Member States were to report on their compliance with ratified Conventions directly to the annual Conference. This proved soon to be too burdensome, and in 1926 the Governing Body of the ILO set up a Committee of Experts for the Application of Conventions and Recommendations. In the ever-pragmatic style of the ILO, it was set up first on a trial basis for one year. Now this Committee has about 20 members, who meet for three weeks annually to study reports from governments and, importantly, also from employers' and workers' organizations. Their report is the basis for the deliberations of the annual Conference.

As to the coverage of the International labour standards and the European Social Charter, some areas are similar, very often down to the letter. This concerns basically rights covering "workers" or professional interests. Two thirds of the Charter contain rights at work, and one third is about broader social rights. The rights that pertain to work are in general covered by one or another of the over 190 Conventions and 200 Recommendations of the ILO.

I hasten to note that this does not mean that the ILO has an international labour code of nearly two hundred Conventions which are in force and actively followed up. There are several revisions; for instance some ten sectoral Conventions preceded the 1973 Minimum Age Convention (No. 138). More recently, the 1999 Maternity Protection Convention (No. 183) is the second revision since the original 1919 one. Also, some Conventions are obsolete and others have been withdrawn. The ILO is currently waiting for the approval by its Member States, through ratification, of a Constitutional Amendment which would enable the abrogation of obsolete instruments.

Furthermore, in the field of maritime labour, over 30 Conventions and an equivalent number of Recommendations are to be taken over by the new Maritime Labour Convention. Approved by a special maritime session of the International Labour Conference in 2006, it is expected to enter into force soon.

Some years ago a Working Party of the Governing Body (the "Cartier Group") analysed all the except Conventions of the ILO adopted before 1985 and concluded that about 60 - 70 of them are up to date and should be promoted. A new review is being planned now. In most of the areas, such as occupational safety and health, social security, labour administration and employment policy, there are what could be called "lead Conventions" in which the most fundamental aspects are set out.

Thus, while the European Social Charter is a comprehensive piece of work, or a set of comprehensive Charters, the ILO rights - and rules - are set out in a broad array of instruments. It may be that this gives the Charter a more promotional framework than the international labour standards, which set out a legal framework which, through ratification, becomes binding.

The similarities are obvious. The core or fundamental rights at work are covered by both systems: freedom of association and the right to collective bargaining; the abolition of forced labour; the elimination of child labour; and non-discrimination in employment and occupation (including equal remuneration).

On workers with family responsibilities, the ILO's Convention No. 156 parallels Article 27 of the European Social Charter. Other convergent areas include the protection of workers' claims in the case of insolvency of enterprises; the access to employment of workers with disabilities, and the applicable standards in the case of termination of employment.

One of the divergent points is the free movement of persons, which is included in the Charter. The right to undertake economic activities in the territory of other treaty parties is not a concept for labour standards. Neither does the ILO generally recognize labour rights which would be limited to nationals of a given country. It assumes that conditions of work, defined by labour standards, have to be the same

for nationals and non-nationals. There should be no discrimination of any workers, but their right to entry is not a question for the labour rights system.

Also, the concept of "dignity at work" has not - or at least not yet - become an operative legal concept for the ILO.

The broader social rights that fall outside the direct scope of the ILO's instruments include health, social and medical assistance, social services, rights of the disabled beyond the workplace, family protection, and the protection against poverty. However, the latter would, in the ILO, rather take us into grounds covered by Declarations, which are not legal avenues. Relevant in this context are the 1944 Philadelphia Declaration as well as the 2008 Declaration on Social Justice for a Fair Globalization.

Similarities between the systems are also immediately recognizable in supervision. This implies, among other things, regular reporting, complaints, the use of a committee of experts, and validation of the findings of experts at a higher political level. This political level does not, as a rule, turn down expert opinions but rather elaborates on them, often also updating them, especially when a government is asked to report directly to that level (for instance governments reporting to the Committee on the Application of Standards of the International Labour Conference.

What is particularly important in the case of the ILO is that this action by the Conference, on the basis of the experts' report, can address topical issues. Some of the cases are significant. An example is that of Zimbabwe, where the political crisis has had a significant trade union rights aspect and where the Conference recommended resorting to the establishment of a Commission of Inquiry. This proposal came up in the political discussion that the Conference conducted on the expert's report.

A complaint on Zimbabwe was presented by employers' and workers' delegates to the Conference in 2009. The Commission of Inquiry worked throughout 2009, including three weeks on the ground, and their report was published in 2010. Also, in 2010 a cooperation programme, agreed upon on a tripartite basis, was launched to deal with the issues recommended by the Commission of Inquiry.

In Belarus, one of the key criteria for the European Union's decision to withdraw trade preferences (GSP) was the lack of progress on trade union rights. Likewise, if sufficient "progress" can be established by the ILO's standards mechanism, the GSP could be restored. In fact, the information on the ILO's web-site on the application of standards by individual countries is consulted very actively by any country or group of countries with a GSP-system.

I have noted earlier that already in 1926, the system of full and direct reports to the Conference had become too cumbersome. However, reporting cycles have been spaced out without making any changes in the Constitution. Since 1993 the reporting cycle has been 5 years for most Conventions except the fundamental and "priority" ones. For the latter, it has been every two years which is now changing to a 3-year cycle.

The 5-year cycle is maintained, as going into time-frames beyond that would most probably lead into a serious lack of continuity. In addition to the four fundamental categories, the priority Conventions are now moving into a three-year cycle. The priority Conventions are on employment (No. 122), labour inspection (No. 81), labour inspection in agriculture (No. 129) and on Social Security (No. 102).

A quid pro quo with lengthened cycles has also been an agreement on the right of employers' and workers' organizations to break into the cycle with observations on an urgent matter with serious consequences.

Dissimilarities arise out of the fact that in the ILO, reports, representations and complaints can be presented only by national or international employers' and workers' organizations, not NGOs. This reflects the labour rights character of the ILO's instruments, where the supervision is a matter for the three parties who are directly concerned.

Some people believe that this might eventually change. I do not. It is difficult to see a genuine labour issue where an NGO would be the primary organization to raise an issue without getting support from a trade union or an employers' organization.

An increasing number of technical cooperation activities have been developed around the Conventions and as a result of recommendations by the standards supervisory bodies. A notable example of the child labour programme IPEC, which also played a significant role in initiating the work that led into the Worst Form of Child labour Convention 1999 (No. 182). There is a comprehensive core labour standards programme, and within it a special action programme for the abolition of forced labour. Two of the latest additions are the Better Work programme, which looks at the fundamental rights in practice as an element of responsible production, and the Help Desk which gives information for multinational enterprises on the contents and significance of international labour standards.

Such programmes will not, of course, replace the supervisory mechanism or somehow dislocate its base from the International Labour Standards department. The assessment of compliance with the Conventions has to stay with the mechanism based on reports, the Committee of Experts, and the Standards Committee of the International Labour Conference. However, when we turn from

this assessment to remedies, the Conference conclusions have increasingly referred to the services of the International Labour Office, and not only advice but its technical cooperation programmes.

I shall finish my presentation today with a true anecdote, which relates to the question of assessment and assistance.

In 1997, the discussion of unpaid wages was particularly topical in the Russian Federation. A representation under Article 24 of the ILO Constitution had been made; a tripartite Committee had considered the issue, and in November 1997 the Governing Body adopted the report of this Committee, with conclusions and recommendations. Not surprisingly the Governing Body considered that there had been violations of the Protection of Wages Convention 1949 (No. 95) by the Russian Federation.

A few days after the Governing Body session, there was an international trade union conference on the same subject in Moscow, and I had been asked to make a keynote speech. I asked my colleagues in the International Labour Standards Department for a draft of the speech, based on the Governing Body conclusions. I promptly received a text, which outlined the whole problem in some detail.

But then I asked for the solution, or possible solutions, to be included. Alas, for that I had to go to another part of the Office which dealt with wages policy. I finally did get a presentation which both explained the problem and outlined a range of possible solutions at the macro-economic, regional and enterprise level.

What this underlined is that on one hand, we have to rigorously preserve the legal basis of issues that are examined in different ways by the Organization. On the other hand, we need to build the bridges from the analysis of the problem to the solutions to it. In short, there is need for a comprehensive approach which, I believe, is currently gaining more and more ground.

Fundamental Social Rights in the EU legal order in connection with the European Social Charter

Ms Lenia Samuel
Deputy-Director General in DG Employment, Social Affairs & Equal Opportunities of the EU

I shall start by highlighting the historical importance of the European Social Charter together with the European Convention of Human Rights in advancing the recognition of a rights based approach by the EU institutions. Then I shall turn to the development of two Charters within the EU institutional framework and finally I shall draw your attention to the consequences of the incorporation of the EU Charter of Fundamental Rights in the Lisbon Treaty.

I

Today, as it is well known, the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

These are common principles and core values of the Member States and the EU. The Lisbon Treaty made this explicit by inserting a specific provision -Article 2- in the TEU.

However, this was not always the case. In 1957 fundamental rights were not mentioned in the Rome Treaty.

The role of the European Court of Justice in the recognition of fundamental rights, in particular of Fundamental Social Rights, in the European legal order cannot be underestimated.

For example, whilst the principle of equality of treatment between men and women was enshrined in the Rome Treaty primarily for economic reasons, that is, to avoid distortion of competition, the Court also emphasised its social objective. Later on, the Court even declared that the latter was more important, since what is at stake is each individual's fundamental rights.

The Court also recognized other fundamental social rights. Some pertinent examples are the right of association, the right to strike and the right of collective bargaining. However, this recognition was progressive.

For instance, Advocate General Jacobs refused to recognize the right of collective bargaining as a general principle of EU law (in the 1999 Albany case). At that time the Court avoided taking a stance on the issue. Recently in 2010, the Court decided in case 271/08, Commission v Germany, that the right of collective

bargaining is indeed an EU fundamental right. It was also recently that the Court recognized for the first time, in the famous Viking case, that the right of strike was to be considered among the general principles of EU law.

The Court, in determining EU fundamental rights, drew its inspiration principally from constitutional traditions common to the Member States and from guidelines supplied by international instruments for the protection of fundamental rights on which the Member States have collaborated or to which they are signatories, such as the European Convention of Human Rights and the European Social Charter.

It is, however, fair to say that the European Convention of Human Rights tended to occupy a more prominent place as a source of inspiration for the European Union than the European Social Charter, both in terms of jurisprudence and of primary law.

Several reasons explain this prominence:

- The higher political and institutional profile of the European Convention in relation to the European Social Charter;
- The perception of the European Social Charter as enouncing political objectives rather than binding rights;
- The "à la carte" nature of the ESC which allows contracting states to choose the rights to which they agree to be bound;
- The fact that not all Member States have ratified the ESC and its revision.

Today, however, the ESC has been increasingly recognized by the ECJ whose rulings refer explicitly to it.

I would like to cite in this regard the judgment issued on 15 July 2010 in case 271/08, Commission v Germany where, based on Article 6 of the ESC, the Court concluded that the right to bargain collectively is an EU fundamental right.

It is, however, worth noting that the Court added that its exercise may be subject to certain restrictions. In particular, it should be reconciled with the requirements stemming from the economic freedoms protected by the Treaty on the Functioning of the EU.

EU

The European Social Charter also exerted a visible influence in the development of a rights-based approach within the EU primary law.

The first time that the European Social Charter was mentioned in a text of EU primary law was in the Preamble of the European Single Act of 1986.

Subsequently the European Social Charter was cited in Article 136 EC Treaty (renumbered Article 151 TFEU following the Lisbon Treaty) on the objectives of

EU social policy. According to this provision, the Union and its Member States shall "have in mind" the European Social Charter as well as the 1989 Community Charter of the Fundamental Social Rights of Workers.

As we have seen above with jurisprudence, the European Social Charter does not have the prominence of the European Convention of Human Rights: Article 6, paragraph 3 TEU refers only to the latter:

> *"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".*

Moreover, Article 6, paragraph 2 provides for the accession of the Union only to the European Convention of Human Rights:

> *"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."*

However, the European Social Charter influences the EU legal order. It is indeed one of the sources for the determination of the rights enounced in the EU Charter of Fundamental Rights, as can be seen in the "explanations" which clarify the interpretation of its provisions. This being so, it is worth mentioning that, in contrast to the European Convention of Human Rights and to the Member States' constitutional traditions, the European Social Charter is not explicitly mentioned in the EU Charter as a reference for the interpretation of its provisions (Article 52, paragraph 3). We see, here again, that the ESC is treated differently than the European Convention!

II

At this point, I would like to turn my attention to the two EU Charters, and give them the emphasis they deserve.

First, the 1989 Community Charter of the Fundamental Social Rights of Workers: Albeit legally non-binding and not endorsed by one Member State (the UK), this Charter had high symbolic value. It was a clear and solemn manifestation of the social dimension of the European integration.

It is true that, contrary to the Commission proposal, it did not concern all fundamental social rights but only those which are employment-related. Moreover, it put an end to suggestions -by some- to take steps declaring the attachment of the EU institutions to the European Social Charter.

However, the 1989 Community Charter had the great merit that it was followed-up by a substantive Action Plan which led to the adoption of important EU secondary law in the social area in the 90s.

Second, the 2000 Charter of Fundamental Rights of the European Union: I do not intend to dwell a lot on this. Whole books have been written in this regard!

I would just stress that this Charter is of paramount importance since it covers in one text not only civil and political but also social rights. Thus, fundamental rights are made more visible and predictable to the benefit of all.

Furthermore, as I indicated before, it is legally binding since the entry into force of the Lisbon Treaty. Its effects remain to be seen at a legal level but we saw already the influence it exercised in the aforementioned ECJ case-law on the recognition of the fundamental right of collective bargaining.

If one looks at the rights enounced in the EU Charter and compares it with the ones contained in the European Social Charter, one would conclude that there is some overlap. The former contains indeed several of the employment-related provisions included in the latter. However, the Social Charter enounces also rights which are not provided at all in the EU Charter or do not have the same degree of specificity and detail (e.g. right to vocational guidance; right of migrants to protection and assistance).

On the other side, the EU Charter specifically provides for certain social rights not cited in the Social Charter, such as the right to environmental protection.

It is worth mentioning also that the personal scope of application of the two social Charters is different: The EU fundamental social rights, in particular the ones enounced under the title "Solidarity" benefit to all persons regardless of their nationality, whereas the Social Charter -at least according to its terms- benefit to persons having the nationality of one of the Contracting States.

There is, in addition, a difference as regards enforcement of these rights. As you know, the EU-law monitoring and enforcement mechanisms are more effective than the ones provided for under the Social Charter.

However, I would like to draw your attention to an important point: whilst the provisions of the EU Charter are primarily addressed to EU institutions when elaborating new EU legislation, they do not extend the powers of the Union or establish any new competencies. Additionally, the Member States are only concerned when they are implementing Union law.

In this connection, we should take into account that the EU social law is relatively fragmentary, although it is significantly developed in some areas (for example, non-discrimination; health and safety at work; information and consultation at work; working time).

Indeed, social policy still falls principally within the competence of the national legislator rather than the competence of the EU. Member States are often reluctant

to transfer powers to the EU in this area. We have seen this in cases of Commission proposals blocked before the Council for several years.

For that reason the EU Charter does not, in principle, apply to the conditions of exercise of certain rights, for example the right of association, the right of collective bargaining or the right to strike. It would only apply in cases where there is a link to a specific EU law, for example, when the exercise of the right of strike is in tension with the exercise of an EU economic freedom such as the freedom to provide services in another Member State (the Laval case is a good example of this).

III

In light of the new legal environment which has existed ever since the entry into force of the Lisbon Treaty, the Commission recently adopted (in October 2010) a communication aimed at setting out its strategy for the implementation of the Charter.

This strategy is based on a clear objective: the Union must set an example to ensure that the fundamental rights provided for in the Charter become reality.

The Commission has taken steps to achieve this objective, in particular by strengthening the assessment of the impact of its own proposals which affect fundamental rights. It will also encourage other Union institutions to ensure the full respect of the Charter in their legislative processes.

The Commission will remind Member States where necessary of the importance of complying with the Charter when they implement Union law. It will develop communication actions targeted on the needs of the public.

The Commission will submit an Annual Report on the application of the Charter, which will enable the European Parliament and the Council to hold an annual policy debate. The first report is expected to be issued in spring 2011.

We can therefore expect that the importance of the Charter will increase as a result of the Commission's initiatives implementing the powers accorded to it by the Treaty as modified in Lisbon. It is important that the EU strives not only towards the full respect of fundamental rights but also towards the active promotion and effective exercise of such rights.

Some of our present policy initiatives already reflect this goal. As examples, let me mention:

- the revision of the working time directive upholding Article 31 of the Charter, according to which every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave;

- the clarification of the relationship between the exercise of the right to collective action as enounced in Article 28 of the Charter and the exercise of the economic freedoms safeguarded by the Treaty, in reference to the recent rulings of the Court in the cases Viking and Laval;
- the promotion of fundamental rights in EU agreements with third countries, as well as in the negotiations of trade policy instruments (such as the Generalised System of Preferences;

Negotiations with candidate countries also provide an opportunity for advancing social reform in those countries that give a higher substance and profile to Fundamental Rights (I can refer for example to the reform of the trade union and strike laws that is underway in Turkey).

FINAL REMARKS

Social Europe is confronted by difficult challenges, namely globalisation, rapid technological change, ageing and immigration. Such difficulties are compounded by the uncertain economic and financial outlook and the serious economic and employment situation in several member States.

There might therefore be a temptation to backtrack on the rights-based approach that has been gaining increasing ground in the legislation and the jurisprudence over the recent decades and concentrate instead on short-term responses to the challenges. This would be a mistake.

Policy responses that are shaped by Fundamental Rights are necessary, now more than ever, in order to maintain social cohesion and prevent these difficulties from degenerating into a major social crisis.

Let me close by saying that Fundamental Rights are not only a matter for the future of the EU; they are already part of its present strategy, policy and action.

Need to strengthen the monitoring mechanisms of social human rights

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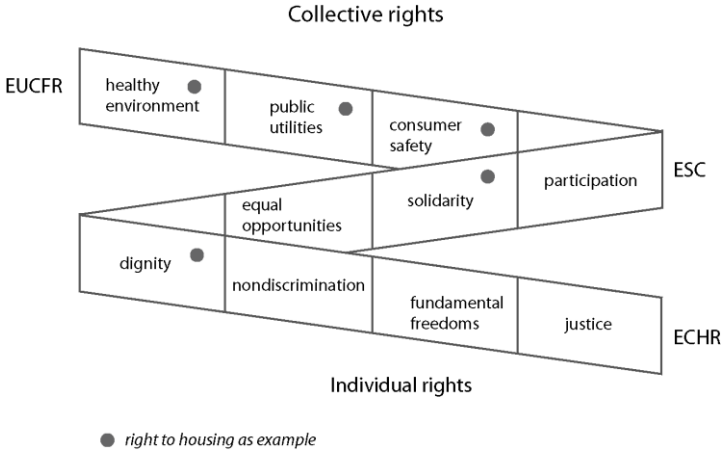
1. Nature of rights

Human rights were created in three stages. They are formed of three generations of rights, which can be described on the basis of value objectives.

Fig. 1. *Three generations of human rights*



The first-generation human rights are civil and political rights based on respect for human dignity, non-discrimination, fundamental freedoms and legal remedies. The second-generation human rights are social rights, which share the value objectives of safeguarding respect for human dignity, securing equal opportunities and providing for solidarity between people and possibilities for participation of organisations (i.e. civil society). The third-generation rights extend the participation right to cover everyone. They also include consumer protection, securing of essential services of economic interest, and healthy and safe living environment.

The Convention of Human Rights (ECHR) regulates the first-generation civil and political rights, and the Social Charter (ESC) regulates social rights, for which a longer term is used within the UN: the economic, social and cultural rights, or, briefly, the ESC rights.

The third-generation human rights are still awaiting regulation, but, in a supranational sense, they have already been given binding content in the EU Charter of Fundamental Rights (EUCFR) as part of the EU Lisbon Treaty.

This third treaty on fundamental rights is also significant because it has consolidated all three generations of rights into one legal document, and their monitoring is done by the same bodies.

In practice, the whole of human rights and fundamental freedoms is more complex than what is set out here. The rights of different generations are partly overlapping and the different rights may reflect many value goals at the same time, for example the right to housing and its regulation, which has been enhanced by each successive generation of human rights.

The right to housing is a freedom right, social right and also a part of contract law, where provisions concerning the protection of the weaker party, and even the living environment, come to the fore.

It is common to characterise the first-generation human rights as subjective and inalienable rights in nature, while the third-generation rights are characterised as collective, dynamic and with the possibility of restrictions. The second-generation rights comprise all that: they are subjective and inalienable when they concern fundamental rights for the protection of human dignity and prevention of discrimination, especially when they overlap with the first-generation rights, but they are also collective and dynamic when the rights concern the promotion of welfare of all persons. The states have the possibility of even restricting these, on three conditions:

1) the restrictions are prescribed by law,
2) the restrictions have a legitimate basis, for which the deterioration of the economic situation is not sufficient, and
3) the restrictions are necessary in a democratic society.

As for inalienable social rights, they concern the protection of human dignity, life of human dignity, health and survival , as well as the prevention of homelessness, disease, social exclusion and discrimination.

In the work of the European Committee of Social Rights this dichotomy becomes apparent from its working methods. In case of rights held as fundamental rights, the working method is described by the term: "obligation of results." The monitoring method in case of rights aimed at distribution and increase of welfare is the "obligation of means".

2. Compliance

In my recently published book, I have identified that of the 98 rights under the revised Social Charter, 24 are these inalienable fundamental social rights, i.e. a quarter of them.

On the basis of this division, I developed a barometer of two components which shows how countries that have ratified the agreement meet (are in compliance with) the requirements of the Social Charter. In fact, I did not do the assessments by myself, but kept to the updated estimates of the European Committee of Social Rights. I viewed a country as having complied with its obligations if the supervisory body, the Committee, had given it a positive conclusion. - Such was the case for 34 countries in 2007 based on conclusions of 2009:

Fig. 2. *Social Human Rights' Barometer of Europe 2009 - Situation in Countries 2007*

Country	All rights N=98	Country	Fundamental rights N=21	Compliance
Finland	62	Finland	14	
Sweden	61	Sweden	13	
France	56	Norway	13	50% or more
Norway	55			
Portugal	54			
Slovenia	50			
Netherlands	48	France	9	
Belgium	46	Slovenia	9	
Estonia	45	Netherlands	9	
Italy	44	Portugal	8	
Germany *	44	Belgium	8	33% or more
Austria *	41	Italy	8	
Lithuania	40	Germany	8	
Greece *	39	Estonia	7	
Cyprus	36			
Ireland	35			
Spain *	32	Austria	6	
Luxembourg *	32	Greece	6	
Denmark *	31	Lithuania	6	25% or more
Poland *	30	Cyprus	6	
UK *	29	Denmark	6	
Iceland *	26			
Malta	24	Ireland	5	
Czech Rep. *	23	Luxembourg	5	
Hungary *	19	Iceland	5	
Bulgaria	18	Malta	5	
Romania	16	Spain	4	
Slovakia	15	Czech Rep.	4	
Turkey	15	Hungary	4	
Croatia *	12	Poland	3	less than 25%
Armenia **	9	UK	3	
Latvia *	8	Bulgaria	2	
Moldova	7	Slovakia	2	
Albania	4	Turkey	2	
		Croatia	2	
		Romania	1	
		Armenia	1	
		Latvia	0	
		Moldova	0	no compliance
		Albania	0	

There were six countries that met more than half of the obligations, but only three as regards fundamental obligations.

States that met more than a third of their obligations were more numerous, and the majority of the countries met more than a quarter of the obligations.

However, there were quite a few of them who did not meet even a quarter of the Charter's requirements. The states at the bottom of the list were those that had ensured only certain individual rights, and three of these countries had not ensured any of the fundamental social rights. - They are nevertheless considered as countries sharing the European values, and some of them are even member states of the European Union.

I also analysed reasons for such poor results. First, it should be noted that in 2009 there were still a number of countries that had not yet ratified the revised Social Charter and their situation had to be assessed on the basis of the 1961 Charter.

Fig. 3. *Compliance with 76 Paragraphs of the 1961 Charter*

	CZE	HUN*	SVK*	CRO	LAT
Not ratified	21	28	12	33	51
Not reported	-	-	-	-	-
Insufficient information	8	14	23	25	5
Not in compliance	25	7	25	6	12
In compliance	23	19	16	12	8

Latvia had made the minimum ratification; 51 rights of the 76 remained unratified. In 12 cases the country did not meet its agreed obligations and fulfilled the required standards only in relation to eight rights. As for the Czech Republic and the Slovak Republic, 25 negative conclusions were issued to both them. These three countries had received more negative than positive conclusions.

Of the countries that have ratified the revised Social Charter, the leading country in terms of negative conclusions was Romania (30), followed by Turkey, Bulgaria, Moldova and Albania, all of which had more negative than positive conclusions.

It should also be noted that the lack of positive conclusions was very much due to the fact that some countries failed to fulfil their reporting obligations as required. The reports of Armenia, Moldova and Albania on their legislation and practice were largely so incomplete that the supervisory committee could not use them as a basis of any kind of assessment.

Fig. 4. *Compliance with 98 Paragraphs of the 1996 Charter*

	MAL	BUL	ROM	TUR*	ARM	MOL	ALB
Not ratified	26	22	34	7	28	34	33
Not reported	11	15	-	45	31	-	-
Insufficient information	18	20	17	6	24	36	46
Not in compliance	19	23	30	25	3	21	14
In compliance	24	18	17	15	9	7	5

Many countries fail to meet their reporting obligations under the monitoring mechanism. The failure to achieve a positive conclusion can, however, sometimes be due to a very minor issue, and, on the other hand, a drop below the bar in relation to one issue may lead to several negative conclusions. - What then could be done in this respect?

3. More effective supervision

The first step would be for the Committee of Ministers to draw attention to this issue and for the states' ministries responsible for the coordination to encourage co-operation bodies to perform better.

Sustainable solutions require, however, focus on the other elements of the supervisory system, too.

If the idea of codification of human rights agreements in a single legal instrument was realised, it would be natural then for all violations, including violations of fundamental social rights, to be dealt with ultimately by one supervisory body, the European Court of Human Rights. This need not mean the eradication of the special features of social rights. Assessment of the rights requiring collective and dynamic development could still happen according to the "Obligation of means" method and it could even be taken up by a separate commission. Also, national processes preceding review by the Court of Human Rights could and should be developed.

If all the countries committed themselves to allowing collective complaints, and especially if individual complaints were admissible, the current reporting system could be given up altogether. This, however, would require an increase of the Secretariat's resources in a way that would allow for monitoring on the basis of other sources. This is what the Secretariat has already tried to accomplish and it has achieved good results, even though resources available for the development have been totally inadequate.

4. Proposals

The following ten proposals could improve the supervisory system. The first five of them could be implemented without substantial additional inputs.

1. The system should no longer allow the ratification of the 1961 Charter, as the 1996 Revised Charter has already existed for 15 years.
2. "À la carte" - type of selective ratification should be abandoned, especially in relation to the 24 most fundamental rights. Rights that overlap with the ECHR rights must not be optional in the alternative treaty, the ESC.
3. Transition from reporting to complaints should be encouraged. Concessions regarding reporting should be given only to those countries which have adopted the Additional Protocol on collective complaints.
4. As regards violations of fundamental social rights, the procedure should be the same as in the Court's decisions. The Committee of Ministers should no longer turn a blind eye to the violations of these 24 rights only because the matter has been dealt with as a process under the Charter and not the Convention.
5. Impartiality of the choice of members for the Committee of Social Rights could be ensured by means of a hearing process. Also, the selection of committee members could benefit from interviews by an independent expert panel and its advisory opinion, which is the intended process for the selection of judges.

Five other measures could be included to improve effectiveness of the current monitoring practice, the implementation of which requires more thorough preparation and possibly also new resources.

6. When the court deals with claims relating to social rights, it should allow for collective claims, or
7. it should transfer decisions on similar issues, which have been considered as non-admissible, for consideration by the Committee of Social Rights.
8. Individual complaints should be allowed the same way as under the corresponding UN and ILO monitoring mechanisms.
9. As regards complaints of violations of social human rights, the complainants should be given the possibility to have their legal costs compensated, especially in case of private persons and national organisations.
10. The Secretariat's resources should be substantially increased, so that it could develop its system of hearings, focus more thoroughly on the investigation of the most serious violations and also develop "automatic" monitoring on the basis of international statistics and other external sources, while, respectively, it could give up report-based monitoring.

Social Human Rights and Estonia

Ms Merle Malvet
Member of the Governmental Committee, Head of Social Security Department, Estonian Ministry of Social Affairs

Estonia ratified the Revised Social Charter in 2000. The decision was made to ratify the Revised Social Charter, and not the original one from 1961. It was a clear political choice of our Ministry of Foreign Affairs, who preferred to ratify the international agreement which reflects a more modern concept of social rights.

As you know, ratification imposes the obligation to provide annual reports, and it also means that each year, states receive feedback – Conclusions -, as to whether the commitments are completed. Indeed, unfortunately not all conclusions are positive.

How have we managed to cope with negative conclusions, and what impact have they had on our legal and social development?

-In some areas it has been quite easy to improve the situation. such as with children's labour rights and medical examination of young workers.

-In some areas we must provide additional information in our reports. Examples of this include situations where labour law is supplemented with law of obligations.

-In some cases the situation is not legally regulated, but in practice the right is guaranteed through other means – for example, such as EU programs. One example here is the possibility to receive vocational counselling.

-A similar, though not identical, situation is that dealing with rights of people with disabilities. We don't have a discrimination ban in a special law but we have a case from the Riigikohus (Supreme Court) who ruled that discrimination of people with disabilities is forbidden by the Constitution.

-In some cases we have already made positive decisions, but it takes time to achieve the objectives. The example is raising the level of unemployment allowance and increasing minimum pensions.

-In some cases it is not enough just to make a decision – it is also important to change attitudes, behaviour or to have a broad-based agreement. For example, it is very difficult to reform public service, which would *inter alia* solve the civil servants right to strike, or achieve high employment of people with disabilities, especially at the time of economic crisis.

-But we also have cases where we disagree with negative conclusions. The example here is the interpretation that states should export social security benefits unilaterally even without concluding agreements. This is a negative conclusion which has been made against many states, almost every state which has ratified article 12 § 4. The opinion of the states is that it would be excessively expensive obligation with negative effect on financing other social rights. It would also place residents of the obliged states to the weaker position compared to the persons who have left the country, as there is possibility to gather a lot of information about the change in residents' situation, including information according to which their right can be determined, suspended or ceased. All states with negative conclusions have also underlined that for concluding the agreements, both parties have to have the will and readiness to conclude the agreement. It is not possible to conclude one-sided agreements. The negative effect of the interpretation is that there are few new ratifications of article 12 § 4 as newcomers try to avoid negative situations.

Although most of attention is always paid to negative conclusions, the positive conclusions have their own strong effects. For instance, in 2009 with the economic crisis Estonia seriously considered the possibility of replacing the system of universal family benefits with the system of social assistance based family allowances. One reason why this was not done was that the Charter does not allow replacing social security with social assistance.

In ten years, the Social Charter has gained quite a lot of awareness in Estonia. Definitely, one of the reasons is that the Charter is one of the international treaties which has (for example, alongside with the European Convention on Human Rights), been used as source of interpretation in giving meaning to the basic rights set in the Estonian Constitution. For example, with reference to the Social Charter it is stated that the state must ensure certain social rights regardless of economic situation.

It is also important that the Social Charter has been referred to in the practice of the Estonian courts, and on all court levels. In the practice of the Supreme Court there are six cases with references to the Social Charter. The Supreme Court has also ruled that at least some provisions of the Charter are directly applicable by the Estonian courts.

It is interesting that we have cases in which the applicants refer to the Social Charter, where the court has used the Charter in their justification and where both parties have referred to the Social Charter. This indicates that at least some part of our citizens know the Charter and some part of the judges use the Charter as an active instrument in founding their decisions. When we are talking about social human rights, and arguing the position that in the modern understanding there is no

distinction between human rights and social rights – as they should be treated as a whole, it is very important to implement that principle in practice. The practice of the Estonian courts is moving in that direction.

It is also remarkable that our politicians know about the Social Charter. We have every year at least one meeting of the Social Committee of the Riigikogu (Parliament), were issues related to the Charter are discussed. Namely, the Conclusions are always translated into the Estonian and then discussed with the top-management of the Ministry of Social Affairs and afterwards with the presence of the minister in the Social Committee of the Parliament. In addition, during these years there have been requests for information several times from the prime minister on the situation with implementing the Conclusions, and two of political fractions represented in the parliament have also made suggestions for the further ratifications of the Charter.

Last year we made our second report on non-ratified provisions and on that basis discussions with participation of representatives of the European Committee on Social Rights and Secretariat of the Social Charter took place in the Ministry of Social Affairs, in the Social Committee of the Parliament and with other parties concerned such as other ministries, social partners and interested NGOs. Recently we received the report with preliminary feedback and in the nearest future we will discuss with the top management of the ministry, whether we could ratify some more provisions of the Charter.

Thus, by now, all doors are opened, but since we have Parliamentary elections in March, the new government will have to make the final decision. We hope that the decision will be positive.

The Social Charter and social NGOs – where should they meet?

Ms Antonina Dashkina
President of the Russian Union of Social workers and social pedagogues, vice-chair of the social cohesion and eradication of poverty committee, INGO Conference of the COE

The Social Charter is 50 years old. NGOs in Europe have a long history, and those in Russia will celebrate 20 years along with the country itself.

I represent a Russian NGO - Union of social workers and social pedagogues of Russia – which is exactly 20 years old. I also represent the INGO Conference of the Council of Europe and was elected 3 years ago to represent the interests of the International Federation of Social Workers, Europe.

As social NGOs, both in Europe and in Russia, we can act as a bridge between the State and social service users. The latter include the elderly and disabled, children and families at risk, migrants, people with mental health problems and many others.

Social Workers, the majority of whom are state and private sector employees, have a key position to ensure that the most vulnerable members of our society are aware of the Social Charter and to ensure that their rights are adhered to.

EMPOWERMENT IS A CORE VALUE of the social work profession and social workers have a fundamental responsibility to empower service users with knowledge, skills and resources so they can influence the decisions that affect their lives (Huff & Johnson, 1998).

Empowerment and social justice advocacy are important components of the Russian Union of Social Workers Code of Ethics. Nearly every European association of social workers has a code of ethics. Social work surpasses all other human service professions in being committed to both individual growth and social action to achieve structural change.

Are most European social NGOs aware of the European Social Charter? The honest answer is not quite. Some of them of course are.

Are social NGOs in Russia aware of the Social Charter? Most of them are not. It is interesting because the values of social work and those expressed in the Social Charter are very similar, as are their respective aims and goals.

The most vulnerable people in our society should expect 8 key things from social services, which are fundamental components of the Social Charter as well:

- Choice: having real options and being able to choose
- Flexibility: creative problem solving and responsiveness to individual circumstances
- Information: which is accessible, proactively given.
- Equal Treatment to other members of society : to experience the same opportunities and risks
- Respect and being heard
- Fairness and non-discrimination
- Cost and value: the right to expect value for money
- Safety: freedom from fear, bullying, abuse and neglect

Asking some Russian social workers what they think clients can expect from them as from professionals, we received an answer – humanitarian aid, food, money. When we asked about respect, safety, flexibility and choice, they said that they did not think about this. Probably if they knew the Social Charter, the answers would be different.

Do service users in Europe know and use articles of the Social Charter in their everyday life when they fight for their social rights? I can only answer about the situation with Russian clients – and the answer is no. The majority of people do not know about this fundamental document. If they knew, maybe the disabled & older people could more actively quote their rights to:

-Have equal access to the full range of community facilities for leisure, education, housing and transport.

-Be able to exercise some reasonable control over services that may affect them or their community.

-Have full information about the range of services available from all agencies.

-Have access to an advocate who can represent them on an impartial basis.

To be honest, I found out about the Social Charter three years ago when I started to be involved with the Council of Europe work, having been elected deputy chair of social cohesion and eradication of poverty committee of the INGOs Conference.

I am passionate about the Social Charter and do believe that social workers and social NGOs have a very important part to play in disseminating information about the social charter, teaching professionals and clients how to use it, lobbying for the interests of the poor and vulnerable referring to its articles, to help to break the vicious circle in which extreme poverty equates with the denial of all human rights.

The Ministry of Health and Social Development of Russia has a joint mission to the Social Charter with the Directorate of the COE to introduce the Social Charter to professionals. Now our NGO is contributing to the effort made by the Government. We organised a workshop about the Social Charter as part of the Congress of social workers of Russia which took place in Moscow in October 2010. More than one hundred people from Kamchatka and Chukotka, Caucasus and Murmansk had a chance to learn about the main principles of the Charter, and to bring this information to their regions.

We are now preparing another workshop on the specific topic THE SOCIAL CHARTER FOR YOUNG PEOPLE in the northern part of Russia, in the city of Kirov, and also plan to bring this knowledge to the Far East of Russia, to the city of Khabarovsk in June this year.

The Council of Europe provides Social Charter books in Russian language. Thousands of copies are distributed among social workers and social NGOs.

A lot can be done in this area and there is plenty of work for politicians, governments, mass media, NGOs and citizens themselves.

Where can the social charter and NGOs meet? At high-level conferences like this, in the field where social workers and NGOs work.

If we really want to eliminate extreme poverty and help our vulnerable citizens, we need to be guided by the concept of human rights and universal respect for human dignity. It is no longer enough to rely on statistics and charity. Our approach now must be to work jointly on rights and access to these rights without discrimination.

Final remarks & conclusions

Ms Jarna Petman
Member of the European Committee of Social Rights, Council of Europe

When an international institution reaches fifty years, the seminars commemorating the anniversary are usually organized in the style of a *festschrift*: they are meant to be honorific and evaluative, programmatic too, seeking to place the institution in history.[1] The anniversary of the European Social Charter, I suspect, will be no different. As was announced by Madam Deputy Secretary General earlier this morning, in the year ahead a number of seminars will be organized in the Charter's honour, no doubt to praise the Charter's conception, defend its execution, explain its shortcomings — and, importantly, like today, to call for its reform and renewal.

Throughout the day, we have heard a number of calls for such reform, not least of course from Mr Matti Mikkola, declaring a moment ago a ten-point Programme for Renewal. So many reform proposals, and, yes, I am for *all* of them, all *for* them. Perhaps this is because I am an international lawyer by training. A friend of mine maintains that international lawyers are a curious bunch in that we tend to see our field as a matter of personal and professional commitment. International lawyers, that is, are *for* the international in a way that, say, tax lawyers are not *for* taxing (I think). Accordingly, reform proposals to enhance the authority of international norms automatically induce a warm glow in us. Perhaps that is the reason. Or perhaps it is just because one tends to develop a genuine liking for and appreciation of the work that one is engaged in. Be that as it may, over the past two years that I have been a member of the Committee, I have developed precisely that sort of an appreciation and, by the same token, have come to regard proposals to reform the Committee with great approval. And I have come to consider the now fifty-year old Charter an unusual document in international human rights law – I mean that in a good way.

When adopted in 1961, the Charter truly was a groundbreaking instrument. It was in many ways the first attempt to give shape and meaningful content – meaningful *legal* content – to social rights. It was to be the counterpart in the field of economic and social rights to the European Convention on Human Rights. And yet, from its inception, the Charter was largely overshadowed by the Convention, gradually turning into what Madam President this morning so politely called a 'Sleeping Beauty'; not everyone would sketch the early years of the Charter with

[1] Cf. David Kennedy, 'A New World Order: Yesterday, Today and Tomorrow', *Transnational Law*

such politesse, but would rather, with notable chagrin, draw a picture of a 'low-profile', 'bureaucratized', 'invisible' instrument. To be sure, the general mood for the first thirty years was that of disillusionment. It was not until 1990 that the mood changed as the process of revitalization of the Charter framework was launched by the Council of Europe. In this process, the newly established collective complaints mechanism played an all-important role.

Indeed, it is no wonder that the collective complaints mechanism should have been the focus of so many of our speakers' reform proposals today, whether coming from inside or outside the Committee. The sixty-three collective complaints that the Committee has thus far received have undoubtedly made possible the development of considerable economic and social rights jurisprudence. As the Committee has articulated and elaborated on the values underlying the Charter, it has consciously employed techniques of reasoning drawn especially but not exclusively from the European Court of Human Rights; as was indicated by Mr Jimena Quesada, the newly elected President of the Committee and, indeed, as was evident from the presentation given by Madam Deputy Director General, Ms Samuel, the impact of the European Union law on the Committee's case-law has become increasingly important. Within a matter of few years, the collective complaints mechanism has introduced a decidedly judicial character into the proceedings, thus qualifying the Charter as a quasi-judicial instrument. From this a number of things now flow.

It is vital, as was urged by Mr Jimena Queseda, that the position and the status of the Committee, its members, and the staff of the Charter Secretariat be accordingly strengthened to ensure that the decisions be rigorous and well-argued. The workload is certainly becoming more and more complex – and it is growing. So far, the increasing number of rather specific complaints under the collective complaints procedure has enabled the development of more and more precise standards. Consequently, one quite expects that more and more contracting parties are now willing to accept the complaints procedure so as to be able to take part in such detailed interpretation of Charter rights – out of sheer self-interest, if nothing else. For its own part, it is safe to say that the Committee cannot go it alone in its interpretations. And so, as many of you have emphasized, the Committee will need to reach out.

We will have to reach out to the States Parties, naturally, but also to the Council of Europe itself. As has so often been pointed out today, we'll have to try and find a better working relationship with the Committee of Ministers, in whose voice our decisions are delivered to the public (or muffled, as the case may be). It certainly is true that the supervision of the enforcement and compliance with the Charter is currently at something less than full potency, lacking as it so often does in political

will. One way to alleviate this is, as has been suggested, through repetitive cases; another might be through engaging the potential of the Parliamentary Assembly in the follow-up process. All in all, there will have to be a more conscious reaching out to the rest of the monitoring bodies within the Council so as to assure a comprehensive approach to social rights. To avoid the fragmentation of rights, the Committee will also need, more specifically, as has been discussed today, to reach out and establish a close communicative cooperation with not only the European Court of Human Rights but also the European Court of Justice. Now this will not be an easy task, that much is certain, since the three treaty bodies do not have the same grounds, or purposes, or motivations, and thus do not view rights from an identical perspective. But try we must, and hope that our acute awareness of the differences will go a long way towards reconciling them.

In striving to ensure the adequacy and the harmonization of international protection for social rights, the Committee will, as before, need the ILO (as was recounted by Mr *Tapiola* with zest, over sixty-seven per cent of the rights enshrined in the constitutive documents of the two treaty bodies are identical), and the United Nations Committee on Social, Economic and Cultural Rights, as well as the various regional courts. And the Committee will, perhaps even more than before, need the various social partners, trade unions and, to be sure, the NGOs – for they truly are in the key position in linking the Charter with civil society. Here, let me echo the passionate arguments put forward by Ms *Dashkina* in assurance of the need to reach out to all levels of society, high and low, to those that make the decisions and those who are the objects of decisions, because of the real changes that the Charter can effect on the everyday life of ordinary people. In this regard, however, Ms *Dashkina* also offered a sobering reminder of how little known the Charter still remains. Many of you have alluded to this during the course of the day, and you are right: more will have to be done to promote the Charter. We will do better.

We will need to do better, you see, because the Charter is but an international treaty, a text – words on paper. As a colleague of mine has aptly argued, what is ultimately decisive of the success or failure of those words is whether they are actually 'taken up and used by individuals, states, courts, administrators, ombudsmen, NGOs and international organizations'.[2] It is only through application that the rights in the Charter receive meaning.

[2] Colm O'Cinneide, 'Social Rights and the European Social Charter: New Challenges and Fresh Opportunities' in Olivier de Schutter (ed.), *The European Social Charter: A Social Constitution for Europe/La Charte sociale européenne: Une constitution sociale pur l'Europe* (Bruylant: Bruxelles, 2010) 167-183 at 183.

In this, of course, social rights are no different from civil and political rights; their meaning too will differ with time and place. Invoked in particular contexts to defend or criticize particular distributive choices, rights reveal their partisan nature and become instruments in the allocation of resources and the struggle over institutional competencies. Inevitably, they will turn into an intergovernmental administrative process in which rights are recognized, limited, weighed against each other and overruled as a matter of routine. That is the point at which well-dressed men and women begin meeting in rooms with high ceilings to talk to each other from behind enormous piles of paper. And that is the moment when the language of rights starts to intermingle with the language of per-diems, allowances, and flight schedules and before long, the next meeting will be about co-ordination of the meetings that will follow. This should not, however, be taken as a recipe for cynicism. As we were so very powerfully reminded by Ms *Lydia Gall* just a moment ago, the critical potential of rights is revealed at moments when liberal actors such as European states step beyond their own liberal principles. You see, a claim of right has a special nature. It is not just an assertion of privilege or an appeal to charity. To say, 'this is my *right*' – my right to housing, for example – is *radically* different from saying 'this is my interest': it constitutes the claimant as a member of the legal, and thus political, community. Engaging in legal discourse, we recognize each other as carriers of rights and duties who are entitled to benefits from or owe obligations to each other; not because of charity, not because of interest, but because such rights or duties belong to every member of the community in that position. This is what human rights do. And this, ladies and gentlemen, is what the European Social Charter does. – A document worth celebrating, and reforming, surely. Would you not agree?

9 February 2011, University of Helsinki

Division of social human rights into fundamental rights and welfare/development rights

Mr Régis Brillat
Executive Secretary of the European Committee of Social Rights[3]

I was asked to make a presentation on the division of social rights into two categories, fundamental rights on the one hand, and, on the other hand, welfare development rights.

We, as lawyers, feel a constant need for classification; perhaps it is a reminiscence of our time in kindergarten when we were asked to sort out different objects according to their shape, or according to their colour.

This game was not a goal per se; it was only a tool to later develop competencies such as reading and mathematics.

My first remark is, therefore, that we should not classify human rights with the goal of making a nice classification. Inevitably, this will lead to a hierarchy among the different types of rights and, as we all know, at the end of the game, social rights run the risk of being badly placed.

Indeed, the very famous three generations theory implies that, since social and economic rights are of the second generation, they are not at the heart of human rights, a place reserved to first generation, civic and political rights.

The three generation theory must be challenged from the outset since we all know that the first international treaty dealing with human rights was the constitution of the International Labour Organisation adopted in 1918, a long time before the Universal Declaration of human rights.

Secondly, the approach according to which civic and political rights require only no interference from the State for the enjoyment of individual rights while economic and social rights require a precise and costly intervention of the State in order to be enforced, is, in my view, incorrect. We all know that the European Court of human rights insists on the existence of positive obligations for states in order to allow citizens to enjoy their civic and political rights. This notion of

[3] The views expressed in this paper are those of the author only.

positive obligations is, again in my view, extremely close to the obligations arising from the European Social Charter in respect of many of the rights proclaimed by this treaty.

Matti Mikkola's new classification, as presented in his book, is in this respect quite interesting because it is a departure from the very damaging three generations hierarchy.

But to further develop this theory, I now feel far from kindergarten : I feel like a student going through an exam in front of his professor, and this is quite a challenging situation.

Therefore, I should immediately inform you that my ambition is not to present *Matti Mikkola's* classification as such, but more to explain to you my understanding of it and of its usefulness.

You will find on page 5 of the book an interesting illustration which presents economic rights, social rights and cultural rights.

Each of these rights is linked to a system of values and to a specific subject matter.

I find this extremely convincing and would propose to continue the reasoning by, firstly, integrating civic and political rights. In addition, my understanding of what economic rights are, is still unclear: according to Matti, these rights are linked to work. This is indeed a very fundamental dimension of economic rights: I read that the right of property guaranteed under the first additional Protocol to the European Convention on human rights can also be qualified as an economic right.

Moreover, the section on cultural rights seems to imply that these are a pre-requisite to exercise the right to work. Another example is the right to vote, a civic right, which is also an essential key to social integration.

At the end of the day, my perception is that all rights are interlinked and that the division between the rights enshrined in the European Convention on human rights and the rights enshrined in the European Social Charter is rather unclear.

As far as the Social Charter is concerned, those who read only part two of the Charter have the wrong feeling that the Charter concerns only obligations of states and not rights for individuals. For example, Article 20 reads as follows:

> "*With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields*:"

On the contrary, provisions of the European Convention on human rights all start by the standard formulation: "Everyone has the right to…"

I would like to invite the reader to also read part one of the European Social Charter, which actually contains the list of rights. Under item 20, you can read:

> *"All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex."*

It is even possible to consider that the Charter is more precise than the Convention since it contains not only the rights in part I but also, in respect of each right, a list of positive obligations in part II. The European Convention on human rights contains only part I, and the positive obligations may be found in the case law of the European Court of human rights.

According to Professor *Mikkola's* theory, human rights may be divided into two categories:

-fundamental human rights

This first category can itself be divided into two types of rights: firstly, those which can suffer no restriction and no derivation and which are extremely limited and appear only in the human rights convention, namely article 2 of the right to life and article 3 prohibition of inhuman or degrading treatment; secondly, all of the rights which can be claimed immediately by every individual as from the entry into force of the treaty in which they are enshrined but may be subject to restrictions according to certain conditions provided by the said treaty. These are the rights of the European convention on human rights except the rights which cannot be subject to any restriction. Also in this category are many of the rights of the European Social Charter, for example the freedom to organise, non-discrimination in employment, right to education, etc.

-welfare /development rights

The second category is composed only of rights appearing in the European Social Charter which are of a different nature from the category of fundamental rights. This is because of their complexity, the cost of their implementation for public and/or private authorities, and their link with the economy situation of the country concerned.

Several provisions of the European Social Charter proclaim rights constituted of several elements which may belong to either of the two categories. A typical example, the right to housing, contains fundamental rights such as the right of appeal in the case of expulsion, or the right to privacy when placed in a shelter. But this provision also contains rights which belong to the second category such as the right to enjoy housing at an affordable price.

In respect of welfare development rights, what is expected from states is not an obligation of result but an obligation of conduct. States tend to understand that it is

enough to take ‘ measures ‘ in the sense of any type of measure, in order to satisfy their obligation of conduct. The European Committee of Social Rights, on the occasion of several decisions on the merits of complaints explained that this is not the case. States must take what could be named ‘qualified’ measures, that is to say, measures which form part of the strategy to regularly improve the enjoyment of the right at stake, within a reasonable deadline, using the full benefit of existing capacity, measures which address the needs, and measures which are reviewed on a regular basis. The Committee also insists on the fact that states should take into account the situation of those who are not concerned by the measures taken. Indeed, measures intended to improve the situation of a category of citizens must by no means be carried out to the detriment of another category.

The task of the European Committee of social rights is therefore extremely complex and it requires very detailed information which, unfortunately, does not always appear in the reports from the contracting parties to the Charter. This is the only way to ensure that economic and social rights are taken seriously and that the work of the Committee leads to concrete results in all European countries.

In conclusion, I would like to highlight that this presentation by Professor Mikkola is extremely helpful in understanding the binding nature of the European Social Charter. Indeed, it considers that the obligations deriving from the Social Charter may vary from one provision to another and this without undermining the importance and impact of the Charter: on the contrary, it highlights the fact that each and every provision of the Charter must be translated into individual rights through means, contexts, and policies by public authorities of the States Parties.

We should never forget that the most vulnerable persons are those who suffer more from the shortcomings in the current protection of social rights which result from the artificial distinctions made in the past and, unfortunately still followed today. These vulnerable persons understand undoubtedly the theory of indivisibility of human rights much more than we do, as a result of the violations they suffer.

That is why Professor *Mikkola’s* theory is very enlightening and invites us and every lawyer involved in human rights activities to stop playing like in kindergarten and to behave like adults whose only aim is to make all human rights effective for each and for every human being.

Social Rights and the European Court of Human Rights

Mr Matti Pellonpää
Member of the Supreme Administrative Court of Finland

My contribution has a very broad title. It would not be possible to try to cover all that could be subsumed under the heading "Social Rights and the European Court of Human Rights".[4] Instead I will focus on certain recent developments in this field, after which I will put forward some considerations as to what the role of the Human Rights Court should and could be in the future, especially in relation to the supervisory system created by the European Social Charter. Professor *Matti Mikkola* has on many occasions promoted the idea of getting the two systems closer and even raised the question whether the Convention and the Social Charter should, one day, be merged into a single document in accordance with the model of the EU Charter on Fundamental Rights. I will make a few brief comments on such ideas as well.

But before going into the recent developments and *de lege ferenda* considerations, a brief reminder of the past. Although many of the common wisdoms concerning supposed fundamental differences between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, can be easily refuted, the categorization of these two groups as the "first generation" and the "second generation" human rights respectively corresponds to the historical truth in the Council of Europe system in so far as pure chronology is concerned. Thus, an instrument on civil and political rights was created first, in 1950, whereas the "second generation" followed 11 years later, in 1961, when the Social Charter was adopted.

When the Convention was being prepared, the priority given to "classical" civil and political rights was explained by the Committee for Legal and Administrative Affairs of the Consultative Assembly of the Council of Europe as follows:

[4] For a more extensive paper by the author, see Matti Pellonpää, "Economic, Social and Cultural Rights", in *The European System for the Protection of Human Rights* (ed. by Macdonald, Matscher & Petzold), Kluwer Academic Publishers 1993, pp. 855-874. For a more recent account on social rights and the European Convention on Human Rights, see Eberhard Eichenhofer, "Der sozialrechtliche Gehalt der EMRK-Menschenrechte", in *Grundrechte und Solidarität - Durchsetzung und Verfahren (Festschrift Renate Jaeger),* N.P. Engel Verlag, Kehl 2010, pp. 625-638. Generally on social human rights in Europe, see Matti Mikkola, *Social Human Rights in Europe,* Porvoo 2010.

"These rights are the common denominator of our political institutions, the first triumph of democracy, but also the necessary condition under which it operates. That is why they must be subject of a collective guarantee.

Certainly 'professional' liberties and 'social' rights, which have themselves an intrinsic value, must also, in the future, be defined and protected; but everyone will understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union, and then to co-ordinate our economies before undertaking the generalisation of social democracy."[5]

One may agree or disagree with this, but with hindsight I would say that it was a wise decision to take this step-by-step approach, especially not to combine civil and political rights and the whole spectrum of social rights in one instrument. This cautious approach made it possible for the European Commission and Court of Human Rights first to concentrate on a few rights, the justiciability[6] of which was relatively uncontroversial, and gradually gain, in the eyes of the member states, the confidence and credibility needed for more ambitious interpretations which were to come later and many of which were to have important social rights related dimensions. By 1979 the Court had come sufficiently far to formulate, in the case of *Airey v. Ireland* concerning right to legal aid in civil proceedings, the following famous passage:

"Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."[7]

That there is no such water-tight division became also apparent when the very first judgments were rendered against Finland in the mid-1990s: the first one[8] was closely connected with the position of children, the second[9] concerned fairness of social security related proceedings.

The time available does not permit to go into details of the Court's case-law in the field of or related to social rights. I may refer to *Matti Mikkola's* recent book

[5] *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* , Vol. 1, The Hague 1975, p. 194.

[6] To be true, the supposed justiciability of only civil and political rights, as distinct from economic, social and cultural rights, is one of the "common wisdoms" which can be challenged. Even so, it is believed that the common perception of the rights guaranteed by the Convention as clearly justiciable made it easier for the contracting states to accept the Court's early case-law.

[7] *Airey v. Ireland, judgment of 9 October 1979, Series A no. 32, § 26.*

[8] *Hokkanen v. Finland, judgment of 23 September 1994, Series A no. 301.*

[9] *Kerojärvi v. Finland, judgment of 19 July 1995, Series A, no. 328.*

Social Human Rights of Europe, where one finds a useful overview of the practice as it has emerged over the years.[10]

Instead of repeating what my namesake has written, I will say a few words about certain developments which are of such a recent origin that they could not have been taken into account even in a book published only a couple of months ago.

I refer to the case of *M.S.S v. Belgium and Greece*, judgment of 21 January 2011, concerning deportation of an Afghan asylum seeker from Belgium to Greece by virtue of the Dublin II Regulation. The case is noteworthy in several respects. For the first time it was held with the authority of the Grand Chamber that expulsion from one Council of Europe member state to another amounted to a violation of Article 3 of the Convention, and this, moreover, in an EU law context involving directly two EU members states and indirectly many more, including Finland. Thus the importance of the case is, if only for the reasons mentioned, obvious. I would submit, however, that the judgment may turn out to be an important landmark case also in the development of social rights related case-law of the Court. While a member state has traditionally been held responsible under Article 3 (prohibition of inhuman treatment etc.) mainly when deporting a foreigner threatened by political persecution, torture or the like consequences, in this case the responsibility of the deporting state, Belgium, was engaged, among other reasons, on the ground that the asylum seeker removed to Greece had to live in the last-mentioned country several months in extreme poverty; he was unable to cater for his most basic needs - food, hygiene and a place to live - and at the same time he was in constant fear of being attacked and robbed. In other words, total lack of social and personal security, as distinct from individual measures of persecution targeted against the applicant, was the reason why he should not have been expelled. Greece was found to have violated Article 3, among others, for similar reasons.

It is true that the Court was cautious to stress that the obligation to provide accommodation and decent material conditions did not arise directly from the Convention; instead such an obligation had entered into positive law through Directive 2003/9 laying down minimum standards for the reception of asylum seekers in the EU member states which Greece was bound to apply by virtue of its own law transposing the directive (§ 250). In this connection the Court also repeated that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home or including a general obligation to give refugees financial assistance or to enable them to maintain a certain standard of living. As a further measure purporting to limit the

[10] Mikkola, *supra* note 4, at pp. 82-94.

significance of its finding in the M.S.S case the Court was at pains in attaching "considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection." (§ 251).

Thus the Court tries to circumscribe the significance of the case. However, anyone who knows the dynamics of the Court's interpretative practice is likely to have a feeling that instead of amounting to a definitive limitation the position taken may be only one link in an interpretative continuum, the end of which is difficult to foresee.

This somehow reminds me of the developments concerning the extension of the so-called civil head of Article 6 (right to fair trial) to cover also social security related proceedings. In the two cases of *Feldbrugge v. Netherlands* and *Deumeland v. Germany* from 1986[11] the Court based the applicability of Article 6 very much on the fact that because of the contributory nature of the benefits and other circumstances the entitlement to the social security benefits (widow pension and the like) at issue had resemblance to civil rights, such as property rights, in a commonly accepted sense. However, when in the case of *Schuler Zgraggen v. Switzerland* (1993) it was faced with legislation where the applicability of Article 6 could not necessarily be based on such considerations, the Court revisited its position and considerably extended the scope of applicability of Article 6 in social security proceedings. The Court recalled that the cases of *Deumeland* and *Feldbrugge* had revealed "a great diversity in the legislation and practice of member States as regards the nature of the entitlement to insurance benefits under social security schemes. Nevertheless, the development in the law that was initiated by those judgments and the principle of equality of treatment warrant taking the view that the general rule is that Article 6 para. 1 does apply in the field of social insurance, including even welfare assistance."[12]

Similarly, one may imagine that the Court might have difficulties in limiting the special protection of vulnerable groups to refugees and asylum seekers. Why should not the "principle of equality of treatment" require that also other vulnerable groups, such as elderly persons and, for example, street children in some countries, deserve the same kind of special social protection?[13]

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[11] In both cases judgment of 29 May 1986, Series A no. 99 (*Feldbrugge*) and 100 (*Deumeland*).
[12] Judgment of 24 June 1993, Series A no. 263, § 46.
[13] The Court has recently communicated to Finland applications lodged by elderly persons notably of Russian nationality who are threatened to be removed to their home country and who allege that lack of social protection and medical care etc. in that country would amount to inhuman treatment also considering that they have close family members living in Finland. For example, as regards application 58254/10 (*Duma v. Finland)*, communicated in February 2011, the Court asks, inter alia, as follows: "In the light of the applicant's claims and the documents which have been submitted, would his removal from Finland be in conformity with Article 3 of the Convention, given his age and

Thus the Convention is susceptible of being interpreted in a manner which brings it more and more in the field of social and economic rights; indeed, once the door has been opened the dynamics inherent in the Court's interpretative approach may lead inevitably in that direction. This then brings us to the question whether the social rights protection should not be entrusted entirely to the Court, perhaps by merging the Social Charter into the Convention structure?

I personally do not think that it should, and this quite apart from the fact that a Court with some 150 000 pending cases on its docket could hardly absorb such a merger. Although the interaction between the Court and the Social Rights Committee, as reflected in concrete interpretations seeking inspiration from each other, is a good thing, and although the Court has developed methods, such as the so-called pilot case proceedings, which make it possible for it to work not entirely differently from the collective complaint proceedings under the Social Charter, I believe that the co-existence of the two systems is conducive to harmonious development of human rights in Europe. The obligations under the Social Charter, which to some extent are dependent on the resources of the country and of a promotional, forward-looking nature, as distinct from being immediately binding as to a particular result, benefit, I believe, from the kind of proceedings based on a dialogue between the states parties and the supervisory organs which the Social Charter provides for.[14] Replacing that system by one in which today the overwhelming majority of all cases are decided in a very summary single judge procedure - and this is now the case with the Court - would not necessarily promote the developments of social rights in Europe in the most desirable manner.

Thus I believe that the co-existence of the two systems should remain, unless the surrounding conditions change necessitating re-thinking. Are such changes imaginable? Perhaps. The position of the European Court of Human Rights differs today, in some respects, in a negative way from that of its peers, i.e. other comparable international courts and tribunals. It is different because of its lack of operational and budgetary independence from the mother organization, the Council of Europe. The Court has no budget of its own, its financing forming part of the budget of the Council of Europe, and the Secretary General of the Council of

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state of health and the absence of any relatives in the Russian Federation?" The applicant was born in 1931.

[14] It is true that the aspect just touched upon is another example of how some traditional views of differences between social and the like rights, on one hand, and civil and political rights, on the other, do not stand full scrutiny. Thus the obligations arising from articles of Part II by which a Contracting State has agreed to be bound are in many respects as "strict" as those arising under the Convention. However, under the Charter there is, in addition, a kind of "promotional" element which in no way weakens but rather strengthens the Charter. To me it seems that for this latter element a procedure based on reporting and ensuing dialogue is an appropriate method of supervision. See also Mikkola, *supra* note 4, at pp. 65-66.

Europe is formally the head of the Registry, i.e. the secretariat of the Court. Although it would not be in the interest of the Court to cut the ties with the Council of Europe, increased operational and budgetary independence would be desirable.[15]

Should the Court one day gain a more independent status in the sense of being more clearly separate from the main organization, the question could arise as to where the Social Charter should belong, to the main organization, or to its semi-independent human rights (or human rights "litigation") branch? Under this scenario, it would not be too difficult to find arguments in favour of saying that the Social Charter's home base should be under the same umbrella with the Court. Perhaps one could imagine a structure not entirely dissimilar from what exists under the judicial system of the European Union consisting of three separate judicial bodies in a clearly defined relationship to each other. Under the human rights umbrella of the Council of Europe there could be, for example, the European Court of Human Rights and the European Court of Social Rights, with or without a hierarchical relationship. However, even under this scenario, which may never or at least not in a foreseeable future become a reality, I believe it would be in the interest of the development of social rights in Europe that the Social Charter and its supervision system remain separate from the Court of Human Rights. Therefore I believe that the European Social Charter will experience many more birthdays after the celebrations of this 50th have come to an end.

[15] See Paul Mahoney, "Parting Thoughts of an Outgoing Registrar of the European Court of Human Rights", HRLJ 2005 (vol. 26), pp. 345-358; Elisabeth Fura, "Vad ska vi ha Europadomstolen till?", *Juridisk tidskrift vid Stockholms universitet* 2010, pp. 672-682, at p. 674.

Social Human Rights and the International Labour Standards System of the ILO

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I shall concentrate on the issue of fundamental principles and rights at work, maybe better known as core labour standards, which have been a topic for intensive discussion since the end of the Cold War. After walls came down with systemic change, the new universal market economy provoked also a discussion on the conditions in which trade takes place. The period leading up to the founding of the World Trade Organization in 1994 also saw much debate on a "social clause", which would have linked new market opportunities to the observance of certain labour standards.

Up to the United Nation's World Summit for Social Development, in Copenhagen in March 1995, there was considerable variation on what was meant by core labour standards. The OECD was conducting an important study, and at one stage it was looking at 10 - 12 different categories of rights, including "a living wage". The Copenhagen Summit adopted a restricted number of categories, which incidentally had been identified by the Workers' Group in a debate on the social clause at the June 1994 International Labour Conference. They were:

-Freedom of association and the right to collective bargaining;

-The abolition of forced labour;

-The elimination of child labour; and

-Non-discrimination in employment and occupation.

The logic for determining and dealing with these rights was explained by the Copenhagen Summit. Key elements in this were that these "fundamental workers' rights" - as they were then called - were those which were defined in the core Conventions of the ILO on each of the topics. They were seen to be rights which are derived from the 1919 Constitution of the ILO. Thus, while countries that had ratified the Conventions in question were legally obliged to strictly implement them, other countries which did not have the legal obligations arising out of ratification were obliged to live up to the principles underlying the Conventions.

At that time there was a set of 7 Conventions. Freedom of association and the right to collective bargaining are set out in ILO Conventions Nos 87 and 98. Two Conventions, Nos 29 and 105, cover forced labour. Discrimination is covered by Convention No. 111 as well as the Equal Remuneration Convention No. 100. The

legal basis for eliminating child labour was at the time the Minimum Age Convention No. 138. Later, in 1999, it was joined by the Worst Forms of Child Labour Convention No. 182.

While the elimination of child labour had, in fact, a relatively narrow legal basis in the ILO (ratifications of Convention No. 138 were not abundant), ever since 1919 there had been several sectoral Conventions on minimum age to employment. In addition, the political will to engage in action against child labour was remarkably high in the period immediately after the Cold War and the opening of global markets. This was witnessed by, among other things, attempts at both consumer boycotts and import restrictions.

The push by above all a number of industrialized countries to bring the issue to the new World Trade Organization ended in Singapore in December 1996 with the Trade Minister's declaration that setting and promoting labour standards were a matter for the ILO. The Singapore Ministerial Meeting of the WTO also declared that labour standards were not to be used for protectionist purposes or for denying legitimate comparative advantages of developing countries.

This anti-protectionist pledge was also included in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which operationalized the agreement reached at the Copenhagen Summit. The Declaration reaffirmed the four categories of rights, now calling them "fundamental principles and rights at work". What had been up to then seen as workers' rights were now recognized to be rights of both workers and employers. Countries who had ratified the ILO Conventions had assumed the "rights", others were to respect and realize their "principles" - hence the negotiated new expression.

The Copenhagen Summit had provoked a ratification campaign of the core Conventions upon the initiative of the Director-General of the ILO. This campaign was given a new impetus by the follow-up of the (non-binding) Declaration. Countries that had ratified the core Conventions continued to be obliged to report on them every second year to the ILO's Committee of Experts and the International Labour Conference. Reporting was now extended to non-ratifiers, for each Convention, and every year. However, this reporting was not to be on compliance with the provisions of the Conventions, but on the measures to respect and realize their principles.

In this process, we can base ourselves on Article 19 of the ILO's Constitution which fortunately gives the Organization the right to request reports on the situation with non-ratified Conventions, in particular on hindrances to, and progress towards, ratification.

After the adoption of the 1998 Declaration, the ratification campaign scored significant results. in a little more than ten years - and with the addition of a new

core Convention in 1999 and also some new Member States - the ratification rate of the core Conventions had reached 90 %. Some of the Conventions lack only a handful of ratifications to reach a universal status.

However, one cause of concern for the tripartite ILO is that the Freedom of Association Convention No. 87 has fallen behind the others. It has even been overtaken by the Minimum Age Convention No. 138, which some saw as moribund before the concern on child labour became something of a global cause. As many large countries (United States, India, China, Brazil) have not ratified Convention No. 87, some half of the working population of the world is not legally covered by its provisions. Nevertheless, the supervisory mechanism of the ILO also includes the Committee on Freedom of Association, which is part of its Governing Body, to which complaints can be presented even in the absence of ratifications.

It is obvious that one of the reasons for the rapid growth of ratifications following the adoption of the 1998 Declaration has been that countries have decided to choose the relative safety and predictability of the regular standards supervisory system instead of a new system, which conceivably could have provoked calls for trade sanctions. Countries, which had not ratified any Conventions for quite some time, found it more advantageous to show that they were "members of the club" and lived up to the expectations, especially as the ILO's supervisory system does not rely on economic or trade sanctions.

At the same time, the core Conventions have migrated into the area of trade policy. Either they or the 1998 Declaration are referred to increasingly not only in GSP systems (such as that of the European Union) but also in free trade agreements. Such references are more common where at least one of the parties is an industrialized country or a group of them. Between the developing countries, such references are most common in Latin America.

The increased ratifications of core Conventions has led into more ratifications of other ILO Conventions, too. It seems that a number of countries had simply lost the habit of taking seriously the need to submit all adopted Conventions to the competent authorities, at least for a position on them, and to have a serious discussion on the prospects for ratification. Reasons for the low rates of ratifications of, in particular, newer Conventions have been explored as part of the Iola's standards policy dialogue.

The combination of information from reports on ratified Conventions and the Annual Reports on the efforts by non-ratifying countries has given the ILO a unique knowledge base on the state of application of the four categories of fundamental principles and rights at work. In 1998, once the Declaration had been adopted, I had the occasion to present it to the U.S. Senator *Daniel Patrick Moynihan*, who had made his doctoral thesis about the ILO. He considered that

such an overview of fundamental rights was how he always had considered that the ILO should work.

The 1998 Declaration developed a strong link with the ILO's technical cooperation activities. The Programme for the Elimination of Child Labour, launched in 1992, has become the ILO's largest single technical cooperation programme, working in some 90 countries. Following a report on forced labour to the 2001 International Labour Conference, a special Action Programme on Forced Labour was set up. It focuses both on "traditional" forced and bonded labour as well as the increasingly topical and global issue of trafficking.

Projects to promote freedom of association and the right to collective bargaining have been realized together with action for promoting social dialogue. They have been a key feature in countries in transition, such as Indonesia after 1998; Ukraine with its continuing activities to reform its Labour Code; Colombia with violence against trade union leaders and the need to secure their safety; Georgia with issues arising out of a "libertarian" Labour Code; Bangladesh; Philippines; Egypt and several other countries.

It has not been possible to establish one all-encompassing programme aiming at eliminating discrimination of work. However, several parts of the ILO - such as the 1998 Declaration programme; the migrant workers' programme; the HIV/AIDS programme; and the gender Bureau deal as a priority with discrimination related issues.

In its conclusions the supervisory bodies of the ILO have increasingly recommended the use of the services that these programmes can provide, in addition to the legal assistance by the Standards Department of the Office. This is especially relevant where the problems are mainly due to a lack of capacity and not necessarily a lack of political will.

The follow-up of the 1998 Declaration on Fundamental Principles and Rights at Work was reviewed by the International Labour Conference in June 2010. The Conference decided that the Annual Reports will continue to be requested on the around 10 % of core Conventions that have not been ratified. The Office will make a compilation of these reports to the Governing Body. In 2000 - 2007 there was a small group of independent Expert-Advisers, who made an introduction to this compilation, but this has not been retained.

Base-line information on all situations of non-ratification is maintained and regularly updated on the basis of information received from governments and employers' and workers' organizations. It is worth noting that data has been received for all countries and thus there are no entirely "white spots" on this map although on occasions the information is somewhat sketchy. These country base-

lines are available on-line, as are, of course, all the regular supervisory comments on the application of standards by ratifying countries.

Since 2000 and up to this coming June Conference, the Office has produced a report - a so-called "Global Report" - on one of the four categories for each yearly Conference session. It is intended to give a dynamic picture of the principle and right concerned in all countries and outline a plan of action for the next four years. In June 2011, with a one-day discussion on a report on discrimination at work, all categories will have been examined three times by the Conference.

As of 2012, this will change. In line with the Declaration on Social Justice for a Fair Globalization, adopted by the Conference in 2008, there will be a full discussion with conclusions and recommendations regularly on all the constitutional objectives of the ILO. This means that core labour standards will be discussed only around every fourth year. However, the discussion will then be much more thorough than currently, and above all the Conference will be able to decide on future action plans.

It is, of course, important to note that this is a separate exercise from the ILO's standards supervisory mechanism and the annual work of the Conference Committee on the Application of Standards. There will be no change to the traditional supervisory process at the Conference. The exercises are parallel. The supervisory mechanism deals with legal aspects and with specific countries.

At each Conference it examines some 25 countries. About a third of them are examined under Conventions on freedom of association, another third under other fundamental categories (forced and child labour, discrimination at work); and a third under what we call technical Conventions. In 2012 there will also be a General Survey on the eight core Conventions.

I firmly believe that these two parallel exercises can be managed in a way which is complementary, with the legal one supporting the promotional one and vice versa. This will also help us to gain more insight in the way in which the four categories of fundamental principles and rights interact, both in law and practice.

Importantly, it will maintain a focus on the role of fundamental rights in the context of globalization, thus contributing to the discussion nationally and within the multilateral system on the social dimensions of globalization. In this way the ILO will continue to play its historical role, which was given to it in Versailles in 1919 and reaffirmed by the 1944 Philadelphia Declaration and which, as the 1998 Declaration and its follow-up demonstrate, has been an important contribution to the debate on the universal market economy that has been developing since the end of the Cold War.

Social Human Rights in Europe and Finland

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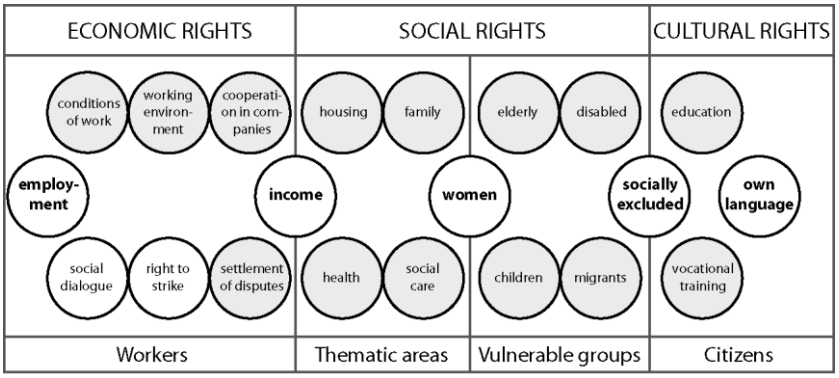
1. Material Coverage

Social human rights regulate economic, social and cultural rights, i.e. ESC rights in short.

The material scope of regulation includes individual and collective labour law, the social rights of various policy areas and target groups, as well as cultural rights, such as right to education, language and cultural habits of minorities.

Fig. 5. *Social Human Rights of Europe – Material Coverage*



The European Social Charter, the 50th anniversary of which is celebrated in the October 2011, contains 98 rights of these fields of law, 24 of which I have defined as having the nature of fundamental rights.

These 24 rights, about a quarter of the norms, are minimum standards and inalienable rights that are to be safeguarded in all circumstances without any restrictions. The remaining 74 rights are dynamic development rights of the welfare state in nature, which ensure that everyone can benefit from social development and growing prosperity.[16]

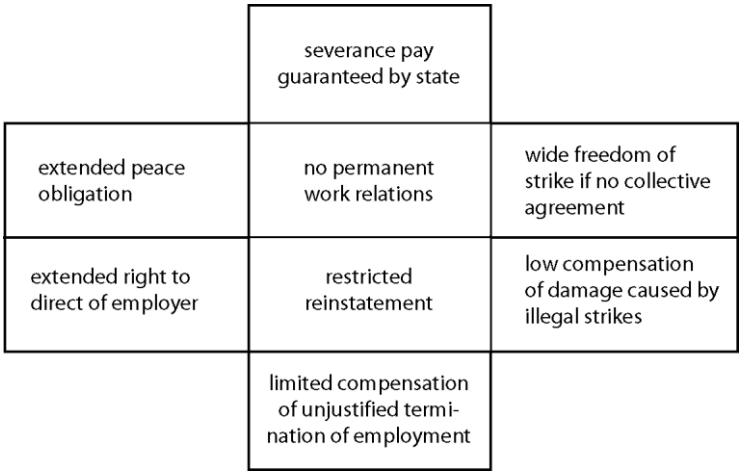
[16] Mikkola Matti, Social Human Rights of Europe. Porvoo, pp. 62-65.

2. Situation in Finland

What kind of rights are they and how has Finland ensured them in its legislation and in practice?

As a whole, the Finnish labour law is wilfully complex in many respects, as are other countries' labour law systems elsewhere in Europe, too. The striking features of the Finnish system are the following:

Fig. 6. *Extracts of the Finnish Labour relations*



In Finland, as elsewhere in the Nordic countries, there is an extensive peace obligation during the validity of collective agreements. On the other hand, employers have broad directive authority in relation to structural production changes and transfer of undertakings, or when they close down factories, as long as the consultative rules are respected. After mass layoffs, reparations and arrangement of severance pay is ultimately a state responsibility. In Finland, the period of notice is often shorter than in many other countries, wages and other compensations for the period of notice are lower for the long time employed persons than what is general in Europe and the responsibility of reinstatement has only a limited sense. Finnish employers, if they so choose, find it easier and cheaper to get rid of their workforce, than in many other countries, especially in comparison to southern Europe.

As if to counterbalance, the strong legal position of the employers, strikes and other industrial actions are nearly unrestricted in Finland during the non-agreement periods (apart from certain restrictions on the collective action by civil servants). On the other hand, even if strikes are illegal, they do not result in significant compensation payments of damages for the industry or for the third party.

Thanks to important contributions by the social partners, Finland, the Nordic countries and Germany have created advanced individual and collective labour law systems which are difficult to compare with similar systems elsewhere in Europe. This is one reason that these countries have been thoroughly scrutinised in the international supervisory practice and they are also leading in the number of negative conclusions. Effects of this practice have been particularly hard on Germany, Denmark and Norway.

Fig. 7. *Minimum Standards*

Maximum weekly working hours: 60 hours
Minimum wage: 60% of the net average wage
Social income: minimum 50% of the net equivalized median income, never below 40%
School attendance close to 100% and no segregation of minorities

Several of the Social Charter's minimum standards concerning income security and public services are expressed by using minimum or maximum indicators. The absolute maximum working hours per week is 60 hours in all circumstances, including the normal working hours, overtime and emergency work. It is known that this limit is often exceeded in maritime transport and offshore oil rigs, sometimes with very negative consequences. Finnish legislation does not permit exceeding this maximum value, but the country received a negative conclusion because the minimum rest periods between daily working hours are not sufficient.

Minimum wage should be 60% of the net average wage according to Article 4§1 of the Charter. In Finland, that average was over the aforementioned threshold the last time it was assessed. But the country has not, however, ratified that provision. The reasons given are that there is no comprehensive legislation and continuous statistics have not been compiled. The government has been pressurised to move ahead with the ratification of this provision, both from within and from the outside, but nothing has happened so far.

The most important minimum standard of welfare benefits concerns both social security benefits and last resort social assistance. The minimum standard is 50% of the net median equivalised income, where income covers capital income, wages and social income. It is half of their medium that is concerned. In Finland, that threshold is around 750 euros a month (749,20 € in 2007) and, in practice, virtually all of the minimum level benefits are below that threshold in our country: national pensions, minimum level of sickness benefit, basic levels of unemployment benefits and last resort social assistance.

If any benefit is at a level below the threshold, as these benefits are, the country's task is to give evidence that the recipients of these benefits do not suffer from poverty. If any benefit falls below the 40% level, which is now the case in Finland, such a benefit has always been considered as "manifestly inadequate". What could be considered as a particularly clear violation of human rights is the situation of those people whose non-discretionary basic social assistance has been cut by 20% or 40% as a sanction. Their benefits amount to less than 30% of the threshold.

As regards general education, the key requirements of the European Social Charter concern

1) attendance rate in basic education and
2) integration of national minorities in mainstream schools. In this respect, Finland has not had problems.

In the countries of the Black Sea region and the area of the former Yugoslavia, the Roma youth have been segregated into their own schools and it has been accepted for long that they become drop-outs.

As regards vocational education, Finland also has difficulties with places in education for all. It is not required by the Charter either, but it is stressed that enrolment must be based on personal aptitude solely, regardless of person's or family's wealth. This requirement applies to all vocational education, from professional schools to universities.

In Finland, this principle was respected in the construction of the welfare state period and it was manifested in particular by the elimination of tuition fees. In many large countries, as well as in post-communist countries, the situation is different. The rich have their own schools and also paid access to higher education. Is the direction changing in Finland, too?

When universities have implemented a kind of company management, complete with managing directors and business professionals as board members, it is possible that ways of the business life enter this house, too. It may include: product development of studies, market-based pricing, productivity gains, staff wage-saving measures, striving at annual profit targets and management reward packages. In particular the introduction of student fees seems to be a revised tendency to what is provided in Article 10§5 of the Revised Charter. – Does all this lead to improved studies or higher quality of research, one may doubt.

The right to education as a human right

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Education is one of the fundamental factors of being a human being. Without growth and development, it is difficult to think about humanity. In developed societies the importance of training and education continues to increase, especially as a formal form of education. Thus it is by no means surprising that the right of all to education has been inscribed in Article 26 of the Universal Declaration of Human Rights.

One indicator of the significance of the right to education is the UN Millennium Goal on primary schooling. The goal is to ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling. The world average for children attending school is estimated to be approximately 90 percent, in developing countries slightly lower. In the developed countries, however, there are still children who do not receive primary schooling. It is the key to many other forms of development as well as human rights. For example, of the eight Millennium Development Goals the right to education is related to the promotion of gender equality and the betterment of health, the prevention of HIV and AIDS and the improvement of environmental sustainability.

The dimensions of the Universal Declaration of Human Rights concerning education are repeated almost per se, evolving in convention after convention. In the European human rights conventions governing education the phrasing differs to some extent from the UN conventions. At the same time the interpretation of Article 2 of the First Protocol of the European Convention on Human Rights rather closely follows the UN conventions. Article 17 of the Revised European Social Charter undertakes that the Parties ensure e.g. that children and young people receive the education and training they need. Rights pertaining to education are also considered in various International Labor Organization conventions, chiefly from the standpoint of vocational training. Anti-discrimination agreements cite education as a field of social life where discrimination is prohibited. Some conventions guarantee the rights of minorities to organize education of their own.

Rights affecting education can be divided to the following provisions: a) the right to education, b) the content of education, c) choice of content and school, d) the establishment of a school, e) schooling free of charge, and f) positive differentiation and prohibited discrimination.

The right to education includes three dimensions necessary to functioning in society: acquisition of the knowledge and skills needed in society and life, for socialization in society as well as the productive task of education and training. All these aspects are essential to well-being. The first can be broadly defined as the right to develop oneself, to grow as a human being. A somewhat less precise expression could be the universal right to knowledge and the performance of science and art. The second dimension refers to the individual as a part of society and the third to the right to create and enjoy the fruits of labor and the right to utilize its results.

A separate human right concerning primary schooling is its obligatory nature, in Finnish terms compulsory education, which is included in the Declaration of Human Rights. Compulsory education is the only obligation cited in human rights conventions, with the exception of Article 29 of the Declaration regarding the duties of the individual towards society and how this reflects on Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. The significance of the obligatory nature of primary schooling is fundamentally that it prevents parents from choosing to give their children no schooling. At the same time it demonstrates how fundamental the human right to primary schooling is.

The ideological point of departure of human rights conventions is that all people can in fact continue in some form of education after primary schooling. This dimension is strongly affirmed in Article 17§2 of the ESC. We cannot realistically and correctly expect that all will obtain the education they desire since the social and industrial structure as well as other corresponding factors requires a specific type of educational structure.

The substantive demands of education are mentioned in their basic form in the Declaration, which includes the development of the entire personality as well as increased respect for human rights and basic freedoms. This also involves mutual understanding, tolerance and friendship between human beings. The substantive demands are most extensive in the Convention on the Rights of the Child.

Qualitative demands of education are included in Article 17§1 of the ESC. Among other things, this provision requires sufficient and adequate services and institutions to implement schooling. Education shall also encourage to the full the development of the personality and the mental and physical capacities of children.

Parents have the primary right to choose the quality of the education provided to their child. This does not, however, give them the right to demand education according to a certain belief, only the freedom from education contrary to their religious and philosophical convictions. Nor do parents have the right to choose education which is in conflict with human rights; the conventions must be interpreted as a total entity. The Convention on the Rights of the Child also

requires that schooling and education also consider the interests of the child. The conventions strengthen the right of individuals and communities to establish and govern educational institutions. Limitations are only set on the substantive goals of education and the minimum level of schooling.

The conventions also include primary schooling free of charge. In Article 17§2 of the ESC the Parties undertake to provide free primary and secondary education. A fee-free alternative must always exist which does not compel accepting education which is contrary to one's convictions. The choice of an alternative form of schooling, however, need not necessarily be fee-free. The same principle is included in Article 10§5 on the right to vocational training.

The relationship between schooling and other human rights is in some cases transparent and sometimes perhaps more ambiguous.

Educational freedom is two-directional. It includes the freedom to teach, study and acquire knowledge in those areas where the individual displays an interest. It also involves freedom in regard to both contents and methods. Limitations on freedom of education entail the same elements as those pertaining to freedom of expression. The right to education must be understood as one form of freedom of expression.

Educational freedom includes the acquisition of knowledge as well as the teaching of all types of information, opinions and other communication. The general education system must also take into consideration the increasing limitations on the right to education arising from educational goals. The purpose of primary schooling, according to the human rights conventions, is the provision of basic knowledge and skills. Furthermore, the schooling must respect certain substantive factors.

Freedom of education increases as the level of the educational system rises, and we can expect it to be greatest in higher and adult education. In higher education it is coupled with academic freedom. At the lower levels, however, educational freedom exists so long as it does not infringe on general goals. For example, methodologically, educational freedom is relatively broad. This is also indicated by the fact that homeschooling is also possible. In a government-run education system equality and protection of minorities are also important aspects.

The basic skills of schooling are often the prerequisite for utilizing other human rights or to demand them. In this sense, we can argue that reading and writing skills are the foundation of all human rights. The ability to understand questions asked in the courtroom or the possibility to petition for one's rights may depend on reading and writing skills. The ability to use one's political rights only orally substantially reduces the individual's possibility to clarify political alternatives. The right to work is significantly increased with reading and writing skills and when discussing

organization by employees in working life, having an effect on working conditions or the use of social and cultural rights, education creates considerably greater opportunities.

This diffuse analysis demonstrates why it makes no sense to differentiate between civil and political rights and, on the other hand, divide ESC rights into different totalities. While in UN and European documents they are for the most part separated into different conventions, it is correct to consider them all judicial rights and not principles. It is also incorrect to believe that the question in some way involves a different attitude toward the utilization of societal resources. Though the realization of the right to education requires societal resources, those resources are also indispensible to the full implementation of political rights. Equality is a special right when it extends horizontally to other rights and the right to education is special when it provides the individual with the prerequisites for utilizing other rights.

Right to employment

Mr Henrik Kristensen
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Article 1§1 of the European Social Charter: full employment as a state obligation?

It has been said that under capitalism the only thing worse than being exploited is not being exploited, that is, being unemployed, wageless, excluded… The renowned economist *John Maynard Keynes* for his part saw two serious flaws in the way the capitalist economy operated: one was that it created unemployment, even relied on it, the other was that it lead to excessive inequality in the distribution of wealth and income.

Now, I don't know if Professor Mikkola – to whom I dedicate my remarks here today – considers himself a "Keynesian", but it is a fact that during his tenure in the European Committee of Social Rights he worked tirelessly on problems of unemployment and inequality, and he was the motor in developing new approaches to addressing these issues from a human rights perspective. In my remarks here, I will focus on Article 1§1 of the Charter, which deals with issues of employment policies and unemployment, and on the Committee's approach to this provision.

The right to employment is an essential human right. Employment is the main source of income for most people and income is necessary for participation in a market-based society, giving access to goods and services. Unemployment, on the other hand, is misery, exclusion and early death for individuals and a colossal waste of resources for society. If jobs could be provided to the unemployed much would have been attained in reducing inequality and poverty.

Together with three other paragraphs, Article 1§1 makes up the right to work in the Charter, but no more than the other paragraphs does it guarantee an individual right to a job. Or at least that is how the provision has been interpreted hitherto. It is understood as a provision of a collective nature and in order to allow for "the effective exercise of the right to work", it obliges States Parties "to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible with view to the attainment of full employment."

Placed as it is in Part II of the Charter, Article 1§1 by definition imposes a legal obligation on States, but the question is of course: what is the exact nature and scope of this obligation and how it is to be assessed. This question has posed numerous problems for the Committee right from the outset, even to the extent that

for a number of years the Committee simply abstained from reaching conclusions on state compliance.

In its first conclusions dating from the exuberant late 1960s, the Committee first of all characterised Article 1§1 as a dynamic provision requiring States to show progress in moving towards full employment. Secondly, it interpreted the provision as an obligation of means rather than an obligation of result.[17] Consequently, a rise in unemployment might not constitute a violation as long as a substantial effort was made to improve the situation (already here it is clear that the 'dynamic' is not one of linear progression towards full employment). Finally, the Committee held that States must not abandon the goal of full employment, for example it stated expressly that abandoning this goal "in favour of an economic system providing for a permanent pool of unemployed" would be a violation of the Charter.[18]

Still, these requirements are very general and the conclusions reached by the Committee in this early period were not very incisive; predictably States Parties were on the whole found to comply with Article 1§1. The Committee itself expressed doubts that it had the right method and the means, or the expertise if you will, to ascertain whether States' policies effectively pursued the goal of full employment. In their official declarations virtually all States were still committed to full employment, but what was "the reality behind the appearance"[19] at a time when such concepts as the 'natural unemployment rate' (*Milton Friedman*) began to emerge? No doubt the uneasiness of the Committee was also due to its being aware that passing judgment on the complex macro-economic choices of States could be seen as taking a political stand not fitting for an impartial legal body.

These problems were compounded by the onset of the economic crises in the 1970s which meant that high unemployment levels became a generalised and persistent phenomenon and in 1981 the Committee simply stopped reaching conclusions on Article 1§1. Instead, for the better part of two decades, it published descriptive reviews merely taking note of the employment situation in the different States Parties.

In 2002, the Committee, "basing itself on its deliberations in recent supervision cycles" then decided to revert to the practice of assessing the conformity of national situations. The Committee reiterated the basic requirements mentioned above, but put a new emphasis on employment policies being active. Most importantly, it added that the assessment would rest - and here I quote - "on a certain number of legal, economic and social indicators which are particularly

[17] Conclusions I, p. 13.
[18] Conclusions III, p. 14.
[19] Explaining its approach to examining national situations in general the Committee has said that "it is constantly concerned to determine the reality behind the appearances." Conclusions III, p. xiii (General Introduction).

linked to the results achieved by states in providing active assistance to unemployed persons and [in] the translation of economic growth into employment." [20]

What this meant was that the Committee would now examine a whole battery of indicators derived largely from statistical data generated in the context of the OECD Jobs Study and the EU Employment Strategy beginning in the mid-1990s. In other words, it was not really a new interpretation of Article 1§1, but a method and a much improved database which gave the Committee a new confidence in judging the national situations.

The indicators fall into four different categories. The first concerns the state of the national economy, notably with indicators such as GDP growth, job growth and inflation. The second is about the labour force and employment patterns, for example the proportion of fixed-term workers and involuntary part-time workers is important to assess the extent of underemployment. The third category is then the various unemployment data, the overall unemployment rate, youth unemployment, long-term unemployment and so on. Finally, the crucial fourth category comprises indicators of effort: expenditure on labour market policy (active and passive) as a share of GDP, participation in active labour market measures as a percentage of the unemployed ('activation rate') and duration of unemployment spells before being offered participation in a measure. Although not an indicator of state effort as such, the output side of labour market policy is also examined, notably the effects of different active measures (training, guidance, subsidised jobs, etc.) in terms of creating lasting employment.[21]

In addition, the Committee also considers European averages[22] for the indicators, not as a criterion of compliance as such, but as a general frame of reference for situating the indicator values for individual countries. Obviously, if a country has above-average economic growth combined with above-average unemployment and at the same time spends less than the average on employment policy and has a smaller than average proportion of the unemployed in activation, it is an alarm bell warning that something is amiss…

The indicators enable an evaluation of whether the efforts made by states are adequate in the light of the economic situation and the level of unemployment and underemployment. The interplay between the indicators is evidently complex and the Committee has proceeded with caution reserving findings of non-compliance for the extreme situations where the effort made by the state seen over a certain

[20] Conclusions 2002, p. 11 (General Introduction).
[21] For a summary of the Committee's case law and the definitions used, see "Digest of the Case Law" at www.coe.int/socialcharter.
[22] Typically the average for EU-15 or EU-27 as provided by Eurostat, but sometimes also ILO or OECD data on Europe.

period is manifestly inadequate given the extent of unemployment and the economic situation or capacity of the state concerned. Two examples may serve to illustrate the reasoning applied in such cases:

The first example dates back from Conclusions 2002 and concerns Italy. Here the Committee noted that despite stable economic growth there was a persistent high level of unemployment in Italy (10-11%), the level of long-term unemployment was very high (61%) and youth unemployment rate was extremely high (31.5%), especially in the south of the country (around 60% in some areas. Against this background the Committee considered "on the basis of the information available at this stage" that the employment policy effort measured by the level of expenditure (1.74% of GDP and in particular by the level of participation in active measures (relatively low with an activation rate of 23-27%), to be inadequate. "The Committee therefore concludes that Italy does not satisfy its obligations under Article 1§1 of the Revised Charter."[23]

In its conclusion concerning Poland from the same year and covering the reference period 1999-2000, the Committee considered that the negative developments in the labour market policy effort, both in terms of activation of unemployed persons and expenditure (decrease in participation in measures, expenditure as share of GDP falling steadily), occurring as they do at a time when the economy is in fact growing (over 4% annually) and unemployment is soaring (reaching 16% in 2000), are irreconcilable with the purpose of Article 1§1.[24]

In its subsequent conclusion regarding Poland (2004) covering the 2001-2002 reference period, the Committee noted that expenditure on active measures had been further reduced. At the same time, both the overall unemployment rate and the long-term unemployment rate had increased considerably (to 19.9% and 54.3% respectively). Moreover, youth unemployment reached an alarming rate – almost 42% in 2002. Under these circumstances, and while recognising the economic difficulties faced by the Government (GDP grew "only" by 0.95% in 2002), the Committee held that the measures taken by Poland did not satisfy the obligation contained in Article 1§1.[25]

The method adopted by the Committee has not exactly met with enthusiasm from governments. It has been characterised as undue interference in the democratic policy-making of states, the Committee has been warned against taking a too simplistic view of employment policy and against focusing too much on public expenditure as an indicator of effort. One government even took the view

[23] Italy, Conclusions 2002, pp. 72-75.
[24] Poland, Conclusions XVI-1 (2002), pp. 521-524.
[25] Poland, Conclusions XVII-1 (2004), pp. 367-370.

that only the total absence of any effort to combat unemployment could justify a finding of violation under this provision.

Apart from the government criticism, which is unsurprising, various more substantive problems inherent in the Committee's method have been raised. One objection is that the method in theory allows for a government to meet its obligation under Article 1§1 by creating low-pay, low-skill and low-quality jobs. Viewed in isolation this may be correct, but the Charter is a comprehensive treaty and should be seen as a whole: fair pay, labour health and safety and adequate social security, etc., are guaranteed by other provisions of the treaty.

Another problem may be that the Committee does not properly take into account the longer term effects of fiscal and monetary policies, industrial policy, deregulation policies, etc. To this it may be countered that the way these policies have been applied over the last 40 years definitely has not resulted in high and stable levels of employment, and much less full employment. The traditional argument advanced by politicians of most colours that "we just need a few years of sacrifice and austerity, so that competitiveness can be restored and business can thrive again", is not really convincing, neither empirically nor from a human rights point of view.[26]

Perhaps the thorniest question is whether the Committee with its method has *de facto* given up on the full employment objective and instead resigned itself to what by some has been called "full employability". In its practice the Committee has accepted high levels of unemployment, as much as 10-12% for extended periods of time. As long as the unemployed are properly *activated*, that is, are provided with income support and various forms of training and advice in reasonable quantities, the Committee has been willing to disregard the issue of whether real jobs were created. This arguably comes close to accepting a "permanent pool" or a "reserve army" of unemployed, who are *employable* when and if the market needs their labour.

Despite these problems and criticisms, it remains that Article 1§1 as applied by the Committee over the past decade can, at least to some extent, function as a safeguard or a check that mass unemployment is not too easily accepted by States as a price to pay for achieving other ends, notably certain economic targets such as a low inflation rate, sovereign debt reduction or keeping wages down.

So what does the future hold for Article 1§1? Well, the States Parties are due to submit reports on Article 1§1 by the end of October 2011 and the economic crisis leaves no doubt as to what to expect: a number of countries will report that

[26] The “trickle-down theory” is flawed at the core: not only have periods of sustained growth in the last decades not created full employment, they have also not reduced inequality in the distribution of income and wealth, quite the opposite in fact.

unemployment has increased dramatically and austerity budgets will evidently constrain the employment policy efforts that can be made. It is to be hoped that the Committee will not throw in the towel in this situation, as it did following the oil crises of the 1970s, and that it will maintain its current practice of assessing national situations, perhaps refining and developing further its use of indicators to be able to determine with greater precision those cases where states deliberately ignore or seek to create or perpetuate unemployment. Economic policies have impacts on human rights, the right to work first among them, and these policies should not be beyond the reach of a human rights body such as the Committee.

Another question is whether the Committee has the will and the resources to attempt more radical new departures. An ambitious venture, perhaps a utopian one, would be to re-consider the scope of the full employment objective and the traditional assumption that Article 1§1 does not guarantee a right to a job for all. An argument could be made that the right to work entails a corresponding duty for the State Party to make work available to everybody who wants to work. Already *William Beveridge* thought that the ultimate responsibility for seeing that there is sufficient demand for all the labour seeking employment must be taken by the state.

Some contemporary economists have made quite a convincing case that full employment can be had through a public job guarantee (the state becomes 'employer of last resort' – *Hyman Minsky*) without affecting macro-economic balances, including price stability. In this model, public employment at a fixed wage level functions as a 'buffer' vis-à-vis the boom and bust cycles of the private sector: expanding when the private sector contracts and contracting when the private sector expands. In addition to making public jobs available to the unemployed, including the less skilled, a job guarantee would allow the realisation of socially desirable projects, for example environmental projects, caring for the elderly, community services, etc., and for the persons concerned there would be the benefits of effective inclusion and on-the-job training opening the way for eventually moving to private sector employment. Perhaps such ideas would be worth exploring for the Committee…

Trade union rights under the ECHR

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Right to Collective Action in EU, ILO and Council of Europe

Central trade union rights have traditionally been regarded as a triangle comprising the right to form and join a trade union, the right to collective bargaining and the right to collective action. Of these rights one may say that the right to form and join a trade union is rather well rooted and established in law and practice of the Member States of the Council of Europe. I will therefore focus in this brief article on the present status of the right to cross-border collective action but will also touch upon the right to collective bargaining insofar as this is needed to explain the right to collective action. These areas are subject to evolution on the European legal scene, and not just because of the binding decision of the European Union to join the European Human Rights Convention (ECHR). Strong tension even exists between the case-law of Luxembourg and Strasbourg, flavoured by the authoritative positions of the ILO that are obviously respected in Strasbourg but so far not in Luxembourg. My thesis is that, in the future, a change of the Luxembourg case-law is necessary, so as to align to the ILO/ECrtHR line.

ILO Tradition in a Nutshell

The right to collective bargaining and action are at the heart of the International Labour Organisation (ILO). Freedom of association is enshrined in the Preamble to the ILO Constitution, as well as in the Philadelphia Declaration of 1944 which also includes "the effective recognition of the right to collective bargaining" (Article III(e)). Further on, the right to collective bargaining as one of the main objects of freedom of association is covered by the core convention, namely by the Convention No. 87 on Freedom of Association and Protection of the Right to Organise, 1948.[27] This Convention is supplemented by Convention No. 98 on Right to Organise and Collective Bargaining, 1949. It highlights the voluntary

[27] In terms of the ILO's tripartite Freedom of Association Committee: "The preliminary work for the adoption of Convention No. 87 clearly indicates that "one of the main objects of the guarantee of freedom of association is to enable employers and workers to combine to form organisations independent of the public authorities and capable of determining wages and other conditions of employment by means of freely concluded collective agreements. (Freedom of Association and Industrial Relations, Report VII, International Labour Conference, 30th Session, Geneva, 1947, p. 52.)"; See Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. International Labour Office, Geneva 2006 (ILO Digest), para 882.

nature of the bargaining (Article 4) that the Member States have to promote. The requirement of the independence of social partners in bargaining, i.e. the non-intervention in principle by the state, is recognized by the monitoring practice. All the EU Member States have ratified these Conventions.

Furthermore, the monitoring practice of Convention No. 87 shows that the right to collective action (strike) has been protected since the 1950s. The Freedom of Association Committee of the Governing Body of the ILO "has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests."[28] In other words, "the right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87".[29]

Strike Law of the European Court of Justice

In *ITF and FSU v. Viking Line*[30] (hereafter "*Viking"*) the European Court of Justice (CJEU) found that the EU market freedom concerned, i.e. freedom of establishment for companies, has a horizontal direct effect between those private parties, thus being able to encroach on the right to collective action. It wasn't any hindrance for the CJEU that the right to collective action is a fundamental right and obviously falls outside the legislative competence of the EU, because, as with social security and direct taxation, the EU Member States are, in terms of collective action, nevertheless compelled to respect EU law, hence the market freedoms, too.[31] This was of judge-made law at the EU-constitutional level. The reasoning was somewhat balanced by a general statement that the EU is also a social union which necessitates a balance to be struck between its economic and social aims.[32] Still, the crucial question for the CJEU was to what extent *das Sozial* (right to collective action) was able to restrict the market freedom which led it to impose – in the justification of the restriction - an open proportionality assessment in deciding upon legality of the collective action.[33] The inevitable consequence is that judges become empowered to decide whether the collective action is a suitable measure, perhaps premature or too heavy a weapon, etc., interest issues where the courts should intervene only at a manifest abuse of rights.

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[28] ILO Digest, para 521.
[29] ILO Digest, para 523.
[30] With the whole names International *Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and Oü Viking Line Eesti*, case C-438/05; judgment rendered 11.12.2007.
[31] *Viking*, para. 40.
[32] *Viking,* para. 79.
[33] *Viking,* paras. 84 and 87**.** It is noteworthy that CJEU did not follow its earlier case-law regarding the proportionality assessment and protection of workers in the context of the market freedoms. In case C-341/02 *Commission v. Germany* proportionality did not affect a "normal" wage setting situation (see para 24 cfr. paras. 39 and 40). Simultaneously, in case C-60/03 *Wolff&Müller* protection of workers in a genuine sense – thus, being of real protection in pay (in that case liability) provisions – was the final yardstick of proportionality; paras. 43 and 44.

Such a proportionality assessment makes it impossible for trade union leaders to know beforehand the legality under EU law of the union's action and opens the risk of damages which could even lead to bankruptcy. This holds true although the proportionality assessment was somewhat guided by a reference to the case-law of the ECrtHR at that time (11.12.2007).[34] I refer to this below.

As to the reasoning in *Viking*, it is still noteworthy that the CJEU found the ILO Convention No. 87 – for the first time mentioned by an CJEU judgment - on freedom of association and the European Social Charter, for its part, showing how the right to collective action was a fundamental social right.[35] One may note that the CJEU also had the Social Charter "in mind" as Article 151 TFEU (ex 136 EC) expresses but, in fact, the CJEU did not reason at all on the monitoring practice of these international instruments.[36]

I just mention the sister case Laval[37] before the CJEU, which concerned a clash between the freedom to provide services and the right to collective action. There the issues relating to the fundamental status of the right to collective action and to the relationship between market freedom and collective action were shaped identically with that in *Viking*.

Demir and Baykara by ECrtHR

The most important justifying ground for the right to collective action is the effective recognition of the right to collective bargaining. The latter right was at issue in *Demir and Baykara v. Turkey* (hereinafter "*Demir*").[38] It therefore merits a brief presentation.

The basic facts in *Demir* can be summarized, as follows: a trade union of Turkish municipal civil servants concluded a collective agreement with the city of Gaziantep on terms and conditions of employment. Since the city council did not fulfill the agreement, the union resorted to judicial proceedings concerning certain pecuniary terms. In the end of those proceedings the Court of Cassation found that the civil servants were not entitled to form a trade union, leading to the annulment *ex tunc* of the collective agreement.

The Grand Chamber of the ECrtHR rendered its judgment in *Demir* on 12 November 2008. The Court found unanimously and with a pan-European

[34] *Viking*, para. 86.
[35] *Viking,* para. 43.
[36] As to the European Social Charter, Austria, Greece, Luxembourg and Poland are not bound by Article 6(4); however, in Greece the right to collective action is a constitutional right.
[37] Case C-341/05, judgment rendered 18.12.2007. A case as such is that the reasoning under protection of workers culminated in assessing the situation from the point of view of the posting company; para 110.
[38] Application 34503/97. The first facet of the case concerned the (excluded) right of civil servants to form and join a trade union. In that respect, too, the Court found a violation of Article 11 ECHR.

significance that the right to collective bargaining has, "in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention…".[39] As the wording says ("has become"), this conclusion reflected a reconsideration of the earlier case-law, notably the statement in *Swedish Engine Drivers' Union* and *Schmidt and Dahlström*[40] to the effect that the right to bargain collectively and to enter into collective agreements did not constitute an inherent element of Article 11 ECHR. The cited conclusion in *Demir* followed a wide account of international instruments, such as the ILO Conventions No. 98 and 151 (the latter concerning the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in Public Service,[41]) European Social Charter, EU Charter of Fundamental Rights and constitutional tradition of a majority of the Contracting States. The Court also relied on the monitoring practice of the ILO Conventions and the Social Charter.[42]

It is notable that the judgment in *Demir* also granted protection to the collective agreement resulting from the bargaining.[43] Furthermore, the judgment stated that the justification pattern for restrictions of the Convention rights in Article 11(2) ECHR has to be applied in light of the relevant instruments in international labour law, too.[44]

Since *Demir* it was apparent that a reconsideration of the earlier case-law on the right to collective action was to follow. The right to collective bargaining without the right to collective action is just collective begging.

Enerji by the ECrtHR

On 21 April 2009 a Chamber of the ECrtHR rendered judgment in *Enerji Yapı-Yol Sen* (hereinafter *Enerji*)[45] and the judgment became final on 6 November 2009. That judgment suffices here to demonstrate the new era in the ECHR strike law.

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[39] *Demir*, para 154.
[40] *Demir,* para. 153; *Swedish Engine Drivers' Union* had the application No. 5614/72, and *Schmidt and Dahlström* No. 5589/72 respectively. As an intermediate position one may mention *Wilson* (appl. No. 30668/96) in which the Court found that trade unions must be free, in one way or another, to seek to persuade the employer to listen to what they had to say on behalf of their members (para. 44); furthermore, in *Wilson* the Court also found that "[i]t is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to *regulate* their relations with their employers", para. 46 (emphasis added). The door for a real right to collective bargaining was opened.
[41] While *Demir* concerned civil servants, it was natural to rely at that point on the ILO Convention 151 which is a *lex specialis* in relation to Conventions 87 and 98.
[42] *Demir*, paras. 38, 39 and 43 on the ILO Conventions and paras. 46 and 50 on the Social Charter.
[43] *Demir,* para. 157.
[44] *Demir*, para. 165.
[45] Application 68959/01.

Of the facts in *Enerji* it suffices to state that the office of the Turkish Prime Minister had banned by a circular the participation of all state civil servants in an action (strike) day of the trade union Enerji Yapi-Yol Sen that promoted the attempt to reach a collective agreement.

The Court stated that the right to collective action was not an absolute one when it can exclude civil servants exercising functions of authority on behalf of the State. In any case a general ban on strike constituted an unjustifiable interference under Article 11 ECHR, thus a violation thereof.[46] Equally important here is the way in which the Court construed the right to strike. It wrote:

> "24. "...The terms of the Convention require that the law allow trade unions, in any manner not contrary to article 11, to act in defence of their members' interests (*Schmidt and Dahlström v. Sweden*, [...]; *National trade union of Belgian police v. Belgium*, [...]; *Swedish engine drivers' union v. Sweden*, [...]). Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests (*Schmidt and Dahlström*, [...], § 36). The Court also observes that the right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an undistinguishable corollary of the right of trade union association that is protected by ILO Convention C87 on freedom of association and protection of the right to organise (for the Court's consideration of elements of international law other than the Convention, see *Demir et Baykara*, [...]). It recalls that the European Social Charter also recognises the right to strike as a means of ensuring the effective exercise of the right to collective bargaining."[47]

Thus, the Court first reread earlier case-law. For instance, in *Belgian police* the Court in 1975 gave the Contracting States rather free hands in deciding in what way the unions may promote their members' interests. No right to strike was guaranteed. *Schmidt and Dahlström* was also read in *Enerji* as supporting the right to strike and leaving aside in *Enerji* the essential reservations stated in *Schmidt and Dahlström*. Still, even a more important aspect was the linking of the right to strike under Article 11 ECHR directly to the ILO Convention No. 87, based on the methodology involving the effect of other international instruments in interpreting the ECHR which was strongly emphasized in *Demir.* Finally, in the *Belgian police* the Court still used the Social Charter as a ground for dismissing the alleged rights under Article 11 ECHR; the Social Charter i.a. did not have any retrograde effect. *Enerji* took, in this sense, too, a qualitatively new step in construing the right to collective action.

The application of the justification pattern in Article 11(2) ECHR in the light of the relevant international instruments (*Demir,* para 165), too, was not expressly

[46] *Enerji,* para. 32.
[47] Unofficial translation produced by the European Trade Union Institute.

done in *Enerji,* while this there, too, operated with the idea of granting the right to collective action to those civil servants who don't exercise a function of authority of the State. This *grosso modo* corresponds to the leading idea in the ILO Convention No. 151 and was certainly sufficient for the purposes of the judgment *Enerji*.

It is of course clear that *Enerji* does not settle everything in the ECHR case-law. Especially restricting the right to strike (collective action) by virtue of the "right of others" will normally create further case-law. However, that category, too, is subject to the criteria of (i) prescription in law, (ii) necessity in a democratic society and (iii) application according to the ILO standards.[48]

Enerji naturally raised the question about the relationship between the Luxembourg and Strasbourg case-law concerning the right to collective action.

Proportionality and Generalia in the Triangle of CJEU, ILO and ECHR

A specific problem of strike law is linked to proportionality. An authoritative ILO position came in February 2010 in a complaint procedure concerning the British pilot union BALPA. Based on *Viking* , British Airways threatened BALPA with an injunction and vast damages (supplemented by heavy trial costs) in the context of a planned strike; under these circumstances BALPA felt imposed to withdraw the strike. In its decision on BALPA's complaint, the ILO Committee of Experts stated how it had never accepted the proportionality of a strike as a criterion of its legality, unless, "in certain cases", at a negotiated minimum service in public services – hence, not in relation to freedom of establishment or freedom to provide services. Further on, the Committee found that *Viking* and *Laval* constituted no reason to alter the traditional position; the Committee considered that "the doctrine that is being articulated in these CJEU judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention".[49]

The difference, in fact the gap, in the case of strike law between the CJEU on the one hand and ILO and ECrtHR (*Enerji*) on the other is radical. The CJEU's strike law, although applicable just in cases involving EU law, is heavily restrictive due to the open proportionality assessment and even formal supremacy of economic freedom over the fundamental social right that appeared in the crucial question of whether the right to strike could justifiably restrict market freedom; the opposite question – to what extent market freedom could restrict the fundamental

[48] A further ECrtHR judgment relying expressly and essentially on the ILO standards is *Danilenkov* (application 67336/01), concerning protection for the strikers against discrimination, see paras. 105-108 and 123.

[49] International Labour Conference 2010, Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 236-7; www.ilo.org.

right to collective action – simply was not discussed at all in *Viking*; that question, too, was present in *Schmidberger*[50], which was the source for the aforementioned question in *Viking*.[51]

In the long run, the aforementioned gap in the cross-border right to strike (collective action) can and one day will be filled by the CJEU aligning itself to the ILO/ECrtHR line. The ECHR rights are, by virtue of Article 6(3), TEU general principles of the Union's law; the EU will adhere to the ECHR, and already now the CJEU has aligned itself to the new case-law of the ECrtHR whenever facing such an issue. A classic example is *Roquette Frères* where the CJEU took due account of the changed case-law of the ECrtHR, in that case in applying Article 8 ECHR in a competition law investigation.[52] Finally, an "alignment imperative" for the CJEU stems from the fact that the EU promotes and rewards the ratification and effective implementation of the ILO's core conventions in its customs policy,[53] and in development aid under the Cotonou Agreement.[54] The whole EU, thus its Court of Justice, too, must respect in the EU's internal life what the Union requires externally.

The CJEU might entertain the defense that, in the economic sphere, EU law forms a complete legal order with the established status in primary law of market freedoms, whereas the ECHR or the ILO regime is not such a complete legal order. In that respect, first, the social market economy (Article 3 TEU) must be taken seriously. Secondly, i.a. the customs regime lies in the heart of economic activities, and there, too, the *acquis communautaire* requires the respect of the ILO's core Conventions. Furthermore, the reference in Article 28 of the EU Charter of Fundamental Rights to the protection of the right to collective action "in accordance with Community law" was in *Viking* an essential source for that right's restrictions.[55] After *Demir* and *Enerji* it is worth highlighting that the now legally binding EU Charter, as its Article 52(3) indicates and Article 53 spells out, cannot undermine the ECHR or the ILO Conventions No. 87 and 98. Besides, as the BALPA complaint shows, in the ILO, the supreme status of market freedoms is not recognized. Finally, in the *Viking* judgment itself there was – so as to guide the proportionality assessment – the reference to the ECrtHR case-law. In a new case, it will be up to the CJEU to continue that path.

[50] Case C-112/00, para. 80 in fine.
[51] *Viking*, para. 77, that referred to para. 74 of *Schmidberger*.
[52] Case C-94/00, para. 28.
[53] See Regulation 732/2008, Articles 8 and 9, and Annex III, on generalised tariff preferences.
[54] OJ L 317, 15.12.2000; Article 50.
[55] *Viking,* para. 43.

The definition of “everyone” in the context of right to social security

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Constitutional right to social security is a manifold subject. The questions about situations, in which a state should guarantee the right to social security, or adequate level of social security benefits, are those that come up regularly in academic discussion. While these questions are very fundamental, I am concentrating on a subject that has received somewhat less attention, namely *who is that “everyone”, who’s entitled to have social security*. I’ll bypass the effects of person’s nationality or residence to their right to basic subsistence. Instead, I speculate how we should understand social risk factors as an individual’s characteristics in legal and constitutional context. To some extent my remarks can be applied even when we discuss social and economic rights under the European Social Charter and define whom its provisions protect.

Section 19 of the Finnish Constitution protects indirectly individual’s right to social security in certain situations in life. In the second paragraph of section 19, it is stated that “Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.”

In this respect, the Constitution differs from the Social Charter, because it addresses “everyone” all down the line, while the Charter’s articles are written in such a way that they often provide rights directly to specified groups of people, like “workers”, “the family”, “persons with disabilities” and “elderly persons”. Of course, saying that everyone should have the right to basic subsistence in the event of disability or during old age means just about the same thing as saying that every old and disabled person should have right to basic subsistence.

I should point out that the second paragraph of section 19 of the constitution doesn’t establish any subjective rights to people. It only obligates the state to pass legislation where the details of different social security systems and benefits are regulated. Because of this even the constitutionally significant part of the right to basic subsistence is almost entirely dependent on lower level legislation.

Due to the requirement of legislative action to guarantee everyone’s right to basic subsistence, the conditions of entitlement can be altered by passing new legislation, not to mention that benefits can be cut off with some restrictions. While the Constitution doesn’t guarantee the existence of certain social security benefits

as such, the most important requirement for legislative action is that a person should always have adequate basic subsistence one way or another. In addition, the Constitutional Law Committee has stated that amendments of legislation that diminish basic subsistence shouldn't happen too abruptly or make too significant a difference compared to the prevailing situation, even when this would only mean taking back some previous improvements in the legislation.

Obviously, the scope of different social security benefits is restricted because of their very nature. Beneficiaries of old age pensions need to be of certain age to qualify for the benefit. Disability pension is paid likewise to those who are disabled. This provides that old age, disability and other social risk factors must have a legal definition, which sometimes intertwines with medical consideration. When age limits or disability requirements change, some individuals' possibility to have pension can be postponed or even cancelled as mentioned. The problem is that social risk factors such as old age and disability can be thought of *both* as a condition of entitlement *and* characteristics of a person. We can ask if there is any difference between the two conceptions from social security legislation's perspective.

If old age or disability were seen only as conditions of entitlement, this would *not* usually mean that people's basic rights are breached when amending social security legislation and the definitions themselves, unless the amendment is too abrupt and significant. But could a breach of a person's basic rights be more likely to occur, i.e. does the evaluation of impairment's significance and abruptness become more strict, if old age or disability are also considered as their characteristics? Furthermore, do we have any *constitutional minimum standards for qualifying* for basic subsistence?

While I'm not completely certain about this, there are some arguments that support the impression. The social risks that are guaranteed to be covered for *everyone* are listed exhaustively in the section 19 of the Constitution. Unless there are some constitutional minimum requirements for the definitions of old people and people with disabilities et cetera, withholding this "everyone" from their right to basic subsistence would be just too easy. It is justified to ask how to define the boundaries for lower and/or upper age limits or the degree of disability, whose exceeding would mean a violation of the constitutional right to basic subsistence.

Section 19 of the Constitution in itself gives us very little to base on, when we're attempting to determine the minimum standards, while there most likely are some. As an example, I'll use the age after which a person should have right to old age pension. Currently, a person can apply for national pension from the age of 65 onwards, while they can leave on occupational pension flexibly between 63 and 68 years of age. So far, the Constitutional Law Committee hasn't had a chance or

desire to take an opinion about the possibility of having some absolute limits for retirement age. The opinions taken have always been in relation to the prevailing situation. Keeping in mind the recent political and public debate over suitable age of retirement, there would be use for a fairly uniformly accepted concept of "old age". Could for example everyone aged 65 or maybe 70 be considered "old" in the constitutional context?

As a conclusion, I am willing to argue that according to the Constitution there is *no clear conception* of the characteristics that define those, whose right to basic subsistence should be guaranteed. Only individuals whose characteristics fall into the present legally and ultimately politically accepted and almost freely alterable category of each social risk, are entitled to basic subsistence. We have a million different definitions for "old", "disabled", "ill", "unemployed", "dependent" and even "parent", but I don't see that too many of them if any are considered as constitutionally conclusive or even recommended over others.

While there certainly is no single correct answer how to define the qualities of "old age", "disability" or other social risk factors for good, maybe the theme hasn't been discussed to the extent that it could be, in the manner that for instance the meaning of "poor" has been discussed when arguing about adequate minimum subsistence under the European Social Charter.

Figures

Programme: Seminar on the Reform of the European Social Charter

Venue: Säätytalo, House of the Estates
Address: Snellmaninkatu 9-11, Helsinki
Date: 8 February 2011

09.30 – 10.00 Opening of the Seminar by the President of the Republic of Finland, Tarja Halonen

Welcoming Address: Ms Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe

Part I International Framework

The European Committee of Social Rights and the collective complaint mechanism: present and future

Mr Luis Jimena Quesada, President of the European Committee of Social Rights

11.20 – 12.30 *European and global social standards and their interaction*

Mr Kari Tapiola, Special Adviser to the Director-General, International Labour Organization

The relationship between the European Social Charter and the EU Charter of Fundamental Rights

Ms Lenia Samuel, Deputy Director General of Employment, Social Affairs and Equal Opportunities of the European Commission

14.00 – 16.00 ***Part II Reform needs of the European Social Charter***

Needs to strengthen the monitoring mechanisms of social human rights

Mr Matti Mikkola, Professor of Labour law, University of Helsinki

Social Charter and social NGOs - where they should meet?

Ms Antonina Dashkina, President of the Russian Union of Social workers and social pedagogues, vice-chair of the social cohesion and eradication of the poverty committee, INGO Conference of the COE

Bringing collective complaints concerning violations of rights of the Romani minority to the ECSR – experiences and challenges

Ms Lydia Gall, Lawyer, European Roma Rights Center

Final remarks/Conclusions
Ms Jarna Petman, Member of the European Committee of Social Rights, Council of Europe

Seminar will be chaired by Ambassador Irma Ertman, Permanent Representation of Finland to the Council of Europe

Venue: Main building of the University of Helsinki
Address: Fabianinkatu 33 IV floor, Helsinki
Date: 9 February 2011

Session 1: General issues 9.30 – 11.00

Chaired by Professor Kaarlo Tuori, University of Helsinki, Member of the Venice Commission

- *Division of social human rights to fundamental rights and welfare/development rights*
  Mr Regis Brillat, Executive Secretary of the European Committee of Social Rights
- *Social Rights and the European Court of Human Rights*
  Mr Matti Pellonpää, Member of the Supreme Administrative Court of Finland
- *Social human rights and the international labour standards system of the ILO*
  Mr Kari Tapiola, Special Adviser to the Director-General of the ILO
- *Social Human Rights and Finland*
  Mr Matti Mikkola, Professor of Labour law, University of Helsinki

Session 2: Specific items 11.30 – 13.30

Chaired by Professor Jarna Petman, University of Helsinki, Member of the European Committee of Social Rights

- *Right to education*
  Professor Pentti Arajärvi, University of Helsinki
- *Right to employment*
  Mr Henrik Kristensen, Deputy Executive Secretary of the European Committee of Social Rights

- *Trade union rights under the ECHR*

  Dr Jari Hellsten, Central Organisation of Finnish Trade Unions SAK

- *Right to basic subsistence under the Constitution and the definition of "Everyone"*

  LLM. Ilari Kallio, PhD. Candidate, University of Helsinki

- *Right to social security as human right*

  Professor Lauri Leppik, University of Tallinn

- *Right to housing*

  LLM. Martti Lujanen, Director of the Ministry of Environment (ret.)

- *Fight against homelessness*

  Mr Peter Fredriksson, Senior Adviser of the Ministry of Environment

PUBLICATIONS OF
THE MINISTRY FOR FOREIGN AFFAIRS

Tarja Halonen
President of the Republic of Finland

- "this significant document has become a functional and recognised international treaty, and one of the cornerstones of European social justice."

- "could the Council of Europe codify the current two treaties as a single treaty? This could be linked to a discussion on the third generation rights that should be included in a coherent European Human Rights Convention. - The codification of regulations does not mean that the special characteristics of social rights should be faded out altogether. Their collective and dynamic nature can, and should, be preserved in future. However, where the question is one of fundamental survival, social rights could, and should, also be safeguarded as individual rights."

Maud de Boer-Buquicchio
Deputy Secretary General of the Council of Europe

- "we have positive obligations to secure education, just working conditions and fair remuneration for all, to provide social and medical assistance to those who need it, to guarantee affordable housing, to eradicate all forms of discrimination in the enjoyment of social rights, and so on. Only by meeting these basic Charter obligations can we bring about "deep" security throughout Europe."

- "it is essential that we arrive - and that we arrive soon - at a political upgrade of the Charter so as to place social rights not only at the heart of the Council of Europe's mission, but also at the heart of the ongoing reform of this Organisation."

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