

Conference on “Social rights in today’s Europe: the role of domestic and European courts” – Nicosia 24 February 2017

Opening Session

“SAFEGUARDING SOCIAL RIGHTS IN TIMES OF AUSTERITY”

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Mr President, Ladies and Gentlemen,

Safeguarding social rights in times of austerity may look to many of you as a contradiction in terms. Austerity means less public expenditure, less investment in public services. Inevitably, it means also reduced investment in social policies. In such circumstances, how can one expect a policy development aiming at protecting social rights? The concept underpinning this question is clear: the watchword for all economic policy in Europe today is competitiveness. And competitiveness has been perceived very often as a need to reduce labour costs more than your neighbor country and hence, by extension, reducing social rights. I will try to show that this apparent contradiction of austerity and social rights comes from a narrow understanding of the notion of competitiveness and from a misunderstanding of the very essence of social rights. Just as all human rights social rights require increased rather than lower protection and vigilance, in times of austerity, by all State institutions, including courts.

The economic crisis which Europe and the world have experienced in past years has created challenges for the protection of all human rights, be they

civil and political or social and economic rights. The former President of the European Court of Human Rights, Sir Nicolas Bratza, remarked back in January 2012 that “the economic crisis with its potential for generating political instability seems to spiral further and further out of control. All our societies are experiencing difficulties that few of us can have foreseen only a short time ago. ... Human rights, the rule of law, justice seem to slip further down the political agenda as governments look for quick solutions or simply find themselves faced with difficult choices as funds become scarce. It is in times like these that democratic society is tested. In this climate we must remember that human rights are not a luxury.” Similarly, one year later, Dean Spielmann, the then President of the European Court of Human Rights, recalled that “those most affected by the crisis are the vulnerable, for example prisoners (and in difficult times many people clearly find it hard to accept high expenditure on prison renovation), migrants, who are not received with much enthusiasm, pensioners, who see their pensions being reduced – that is to say, the kind of people that the European Court of Human Rights tends to protect.” This year, Guido Raimondi, the President of the Court, explained indeed that the most significant increase in human rights litigation in the last months relates to deteriorating prison conditions.

For the European Committee of Social Rights, the severe financial and economic crisis had significant implications on social and economic rights, in particular those relating to the right to work, health, social security and social protection. Actually, the increasing level of unemployment is presenting a challenge to social security and social assistance systems, as the number of beneficiaries increase while tax and social security contribution revenues decline. The Committee considered that the

economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter.

Interestingly, judicial rights too may be impacted upon negatively by austerity. The European Commission for the Efficiency of Justice (CEPEJ) noted that the crisis had a clear impact on the development of the justice budgets of several States, affecting in particular the human resources of the judiciary but also legal aid schemes. Both the right of access to justice for vulnerable people and the right to have judicial decision duly and timely enforced are thus put at risk.

The Commissioner for Human Rights stressed that in many European countries young people have been one of the groups mostly hit by unemployment. While calling for policies and strategies to tackle long term unemployment, he also stressed that the temptation to lower labour standards and social protection when employing young people should be resisted and schemes for apprenticeship should not be abused. Interestingly enough, the ECSR found that austerity legislation which allowed fixed term “special apprenticeship contracts”, where fundamental labour law and social security law safeguards were removed, or where the minimal wages foreseen were below the level of poverty, were in breach of the ESC (Collective complaints GENOP DEI and ADEDY v. GR).

The Commissioner further signaled that in many countries affected by the economic crisis an increasing feminisation of poverty had been observed. He noted that women in poverty were more likely to work in low paid, precarious and informal jobs including in the field of domestic work and

faced the risk of exploitation and trafficking. Incidentally, last year the European Committee of Social rights registered an unprecedented number of collective complaints concerning violations of the right to work, the right to fair remuneration, non-discrimination between men and women as regards remuneration, and the right to equal opportunities in employment without sex discrimination.

Finally – and I will stop here – the ECRI noted that a worrying consequence of austerity has been the rise of nationalist and populist parties rooted in profound hostility to ethnic, religious and cultural diversity.

Austerity has thus affected social rights; it has affected human rights generally, it has affected the cohesion of our societies and - I dare say - threatens the democratic foundations of the societal and political projects pursued by all MS of the CoE since its very creation.

It would however be wrong to say that austerity is evil or unnecessary. What we need to understand is that the relation between austerity, growth and social rights is much more complex than a simple equation I mentioned before, ie: less rights mean better competitiveness and more growth. Things do not seem to work in this way. I recall in this respect what Kofi Annan once said: “We will not enjoy development without security, we will not enjoy security without development and we will not enjoy either without human rights”.

Let me now stress the word “rights”.

Social rights, as all human rights, are not policies, wishes, intentions or declarations. Social rights do not belong to specific political parties. They are not rights of the left or of the right. They do not seek to obstruct necessary reforms but rather to provide a sound basis for genuine, well-thought reforms with a sustainable effect. They must therefore be - and they are indeed - enforceable rights. We can of course discuss the question of “direct effect” and “justiciability” of social rights – I sincerely hope this will be in the centre of your discussions today. But we should not miss that what is in the heart of social rights is indeed Justice, not charity. Putting justice at risk in a democratic society means putting at stake its constitutional order; it means challenging democratic institutions and the rule of law; it is a threat to the “contrat social” that makes the fundamental law of each of our societies and the fundamental human rights value of European integration.

The foundation of human rights is human dignity. And as SG Jagland underlined in his report on the state of Democracy and Human Rights in Europe “it is through the implementation of social rights that this dignity is protected. Respect for social rights contributes to peaceful and stable societies. The effective enjoyment of such rights as the right to housing, education, health, non-discrimination, employment and decent working conditions, legal, social and economic protection provides the basis for respect for human dignity”.

It is on this basis that the Turin process was launched. This process aims at bringing the European Social Charter back to the center of the political

debate. You may ask “Why the Charter” and not any other international instrument?

Because the Charter, adopted in 1961 and revised in 1996, is the only binding European instrument on Social rights; because it binds 43 European States, including all MS of the EU; because, just like the ECHR, the Charter is expressly referred in the European Treaties; because the Charter has an implementing mechanism to assess the conformity of national policies, laws and practices with the obligations of States Parties under the Charter; because it has an optional mechanism allowing collective complaints to be lodged with the ECSR; because it is specific and because it is the only European instrument that transforms the social rights of the Universal Declaration of Human Rights into concrete conventional obligations of States Parties.

You will discuss today various aspects of the judicial protection of Social Rights and I am sure you will discuss the risk of possible inconsistencies in the various approaches adopted by European and national courts when interpreting and implementing social rights. I am personally convinced that these differences are not significant and are not likely to create any insurmountable legal conflicts.

For instance, in the decision of the ECSR in the case of posted workers in Sweden, which gave rise to a series of thoughts about the risk of conflicting obligations under EU law and under the ESC, I believe that there is no risk of conflict when the ECSR signals that the implementation of EU legislation in a specific manner may lead to breaches of social rights under the

Charter. Moreover recent political discussions about the need to better frame the practice of posted workers in the EU are evidence that the ECSR was right in signaling the risk of abuse of this legislation.

The ESC is, as we have seen, a widely accepted and extremely useful tool in times of austerity.

This is precisely what the SG underlined in his Opinion welcoming President Juncker's initiative for an EU Pillar of Social Rights. For the SG, the democratic question and the social rights question are very closely interconnected, as the initiative "helps build a Europe better attuned to meeting people's everyday needs and therefore able to promote shared and sustainable growth". Respect for social rights is even more necessary in times of crisis and economic hardship, because it is precisely in times of hardship that disregarding them creates a fertile ground for anti-social, anti-political and racist movements. Such attitudes endanger democracy, the rule of law and human rights . To meet the challenge, we need to promote legal certainty and coherence between the European normative systems protecting social rights, doing away with practices and interpretations that lead to the vicious circle of social dumping. For this reason, we need to put the ESC, as the Social Constitution of Europe, in the centre of the EU Pillar of Social Rights, we need all EU MS to ratify the revised ESC, we also need to recognize the contribution of the collective complaints mechanism, which has proven to be an effective early warning mechanism in the field of social rights.

Courts of law have an important role in this framework. It is indeed for courts to make sure that reforms adopted do not lead to increased

competitiveness to the detriment of justice, or in other terms, to growth that benefits only a minority.

Courts of law, be they European or national courts, will thus be able to give full, coherent and effective protection to the most vulnerable parts of our societies, strengthen the rule of law and – ultimately – safeguard our democratic security.