



European Social Charter | Charte Sociale Européenne



Exchange of views between Mr Giuseppe PALMISANO,
President of the European Committee of Social Rights (ECSR)
and the Council of Europe Rapporteur Group on Social and Health (GR-SOC)

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Introductory speech

by Mr Giuseppe Palmisano, President of the ECSR

First of all, I would like to thank you for inviting me to this exchange of views, giving me the opportunity to offer a humble contribution to your important work on social rights, also with a view to placing social rights and social progress high on the Council of Europe agenda for the 70th anniversary of the Council, and ensuring the prominence of the protection and promotion of social rights in the outcome document of the Ministerial Conference to be held in Helsinki next May.

In my introductory intervention, I will try to touch on all the points set out in DD(2019)30, starting from some general remarks, continuing by presenting some proposals aimed at enhancing the relevance and improving the effectiveness of the European Social Charter (ESC) system, to conclude with some short reflections on how to possibly advance in the coming years on the achievement of the social progress objective of the Council of Europe.

Let me start by recalling that social rights and social progress are since the beginning – since 1949 – one of the Organisation's aims and primary tools for the realisation of the underlying ideals, intended to “source individual freedom, political liberty and the rule of law” as bases of “genuine democracy”.

Protecting and fostering social rights and the welfare state are indeed essential for effectively safeguarding democracy and democratic institutions. I would even say that the protection of social rights and social justice are per se highly important, and should properly be considered as fundamental democratic institutions; not less than the existence and functioning of sovereign legislative parliaments, the right to free and genuine elections, the principle of equality before the law, or the right to a fair trial by an independent judiciary. In fact, social rights and social justice are essential in building and nurturing genuine and substantive democracy in everyday life.

Furthermore, as the Secretary General of the Council of Europe rightly pointed out in his 2015 Report on the State of Human Rights, Democracy and the Rule of Law in Europe,

“[p]olitical systems seen to protect social rights are likely to command greater levels of public confidence. The cohesive quality of these rights has taken on a new importance against a backdrop of ongoing austerity, rising populism and in the fight against violent extremism and radicalisation. By promoting equal opportunity, social rights encourage individuals to remain within mainstream society and help lessen the appeal of other, more extreme or divisive paths.”

But, unfortunately, in the last decade social rights and social justice are – as we all know – under stress, mostly as a result of the crises that Europe has experienced in the last years. And I am referring to the economic crisis, of course, but also to the migration crisis.

Since 2008, the economic crisis had an extremely negative impact on workers, families and the most vulnerable people; and the measures adopted by States and EU institutions to cope with such crisis, in particular so-called austerity measures, also disproportionately affected those who are most vulnerable – the poor, the elderly, the sick.

As for the refugee and migrant crisis, a million migrants and refugees crossed into Europe in the last years, seeking refuge from war, terror, torture, persecution and poverty, and creating division in Europe, namely in the EU and EU member States, over how best to deal with resettling people. Guaranteeing these million people hospitality, respect for their dignity and fundamental rights, prompt and proper social integration in host countries is a major challenge for the European civilization and European democracies, one that cannot be missed, I would say.

The above crises revealed the gaps in States’ legal arsenal for the protection of social rights. Traditional and consolidated high standards in the protection of social rights, and some basic features of the welfare state – which are essential for the enjoyment of such rights, and of which European States should be proud – are indeed in danger.

Increasing poverty and the unemployment rate – in particular youth unemployment –; social and economic inequalities; lack or shortcomings in migrant integration; job insecurity for many categories of employees; regressive changes in social security schemes and benefits; increases in the cost of healthcare: these are among the most worrying signals about the state of health of social rights in Europe.

In addition, with progression in globalisation and automation, magnified by the ongoing technological revolution and the immense potential of artificial intelligence, it is predicted that in the next years employment and work markets will radically change and millions of jobs will be lost. Some forecasts suggest that, in step with the emergence of new elites, the unemployed will soon become irremediably unemployable, while the middle class – which has been pivotal to social progress – thins away.

All this is very worrying and even dangerous but, by consequence, it also tells us that reinforced attention must be paid to the need for effectively protecting social rights at the European level, and not only at the national level, as well as to the need for ensuring access to remedies in case of violation of social rights.

In this sense, crises also represent an opportunity to grasp the importance of achieving such rights, and help increase the political conviction that respect for social rights constitutes the

best way forward to prevent and offer a way out of crises, and – what is even more important – to increase citizens’ participation in democratic processes, reinforce their trust in European construction, by promoting inclusion and social cohesion.

Against this background, consensus is progressively gathering around the idea that there is an urgent need both to bring the European instruments for the protection of social rights back to the centre of the European legal and political stage, and to enhance existing synergies, at the European level, to better protect social rights and strengthen the European model, centred on respect for social rights and advanced welfare systems.

In this respect, the revised European Social Charter has been rightly recognised as a living, integrated system of guarantees, whose implementation at national level has the potential to reduce economic and social tensions, and promote political consensus to facilitate the adoption of the necessary reforms.

The decision of the Council of Europe to launch, in October 2014, the so-called “Turin process” stemmed precisely from such convictions. And it is worth noting that not only the Council of Europe but also the EU institutions recently decided to make a meaningful reference to the Social Charter within the framework of the EU acts establishing the European Pillar of Social Rights: I refer to the reference made to the Charter in paragraph 16 of the Preamble to the European Pillar of Social Rights, as solemnly proclaimed by the European Parliament, the Council and the Commission, on 17 November 2017, in Gothenburg.

But let me add that, if it is true that taking advantage of the Social Charter system’s potential represents a major tool for building up a more social and democratic Europe, it is also true that such a system does have some shortcomings and has to be strengthened, improved, updated and, of course, really implemented, if we want it to adequately meet the challenges that confront, today, the protection of social rights in Europe.

In this regard, I would like to share with you some ideas about desirable steps to be taken in order to enhance the relevance and improve the effectiveness of the Social Charter system.

1) Firstly, enhancing the Social Charter's effectiveness entails seeking to apply it as uniformly as possible throughout Europe. This means bringing about greater acceptance of the 1996 Revised Social Charter: in fact, I remind you that 9 State parties to the Charter (and most of them are EU Member States) have not ratified yet the Revised Social Charter, and are still bound by the “old” Charter of 1961. But it is precisely the Revised Charter that represents, today, the most up-to-date expression of the European perception of social rights. Its ratification by all the States concerned should be seen, therefore, as a priority.

Any initiatives aimed at achieving this goal would be welcome. I am thinking, for example, of specific recommendations by the Committee of Ministers or the Parliamentary Assembly of the Council of Europe, but also of initiatives to be taken by the EU Commission or European Parliament, within the framework of the new European Pillar of Social Rights, which indeed devotes some attention to the Social Charter system.

2) Another improvement and step forward relates to the so-called “à la Carte” system, which characterises the European Social Charter. Such a system enables States – as you know – to choose, with certain limitations and under certain conditions, the Charter provisions that States are willing to accept. Only two States – France and Portugal – have hitherto accepted all the provisions of the Revised Charter, and another few States have accepted almost all the provisions. But too many States have not accepted a high number of articles or paragraphs, including articles and paragraphs that are among the core provisions of the Charter (according to Art. A, para. 1.b, of the Charter). I am firmly convinced that an update of the “à la carte” system could and should be soon envisaged, namely an update aimed at making mandatory for the States parties to accept at least all the 9 core provisions of the Charter, and possibly also further, crucial, provisions, such as Art. 4 on the right to a fair remuneration, Art. 15 on the right of persons with disabilities to independence and social integration, or Art. 23 on the right of elderly persons to social protection.

3) Furthermore, with a view to enhancing the relevance and improving the effectiveness of the ESC system, it would be crucial to broaden participation in the collective complaints Protocol and procedure, which – as you know – enable social partners and non-governmental organisations to directly apply to the European Committee of Social Rights (ECSR) for ruling on possible violations of the Charter in the country concerned.

Let me say that the collective complaints procedure has proved to be an effective and efficient mechanism for supervising State compliance. And this for many reasons. In the first place, the collective complaints procedure allows to identify specific cases of social rights violations, giving the opportunity to the State concerned to remedy them and to prevent new violations, and giving also the possibility to affected groups of individuals to obtain the reestablishment of their rights. Then, the collective complaints are important because they open the door of the Social Charter to the civil society, to NGOs and the world of workers. This means opening the European system for the protection of social rights to its beneficiaries, who are directly and individually interested in the implementation and enjoyment of such rights. These kinds of subjects are indeed the best guardians, I would say, of the rights established by the European Social Charter.

Evidence of this is the fact that, since its entry into force, the collective complaints procedure has become the Charter’s flagship procedure. And it also caused the European Committee of Social Rights to build up an important body of case law, clarifying the meaning, implications and actual effects of the Charter rights with respect to many different subject matters.

Therefore, it is neither accident nor coincidence that in the last two years there has been a very significant increase in the use of the collective complaints procedure, and that the number of registered complaints rose up to more than 170 (it was around 120 at the beginning of 2016).

And it is also worth noting that it is precisely due to the contribution of the jurisprudence produced by the European Committee of Social Rights within the framework of the collective complaints procedure that in the last years we are seeing an increasing application of the Charter by national judges and courts in many States, like Spain, Italy,

Greece and France, particularly in areas such as labour relationships, workers' rights, and pensions; and I refer not only to ordinary judges but also to Constitutional Courts.

But, unfortunately, only 15 States (out of 43) have hitherto accepted the collective complaints mechanism.

Therefore, it would be very important to progress towards a generalised ratification of the collective complaints Protocol. This would be important not only from the standpoint of achieving a uniform application and standard of monitoring of social rights throughout Europe; it would also be of extremely important value from the standpoint of the equality of treatment of States. From such a standpoint, it is in fact hardly acceptable that only 15 States, but not the others, are concerned by this key mechanism for monitoring State respect for social rights, in addition to the reporting procedure; and that national and European trade unions and international NGOs can trigger such a mechanism with respect to situations or cases concerning only certain States, and not the others.

For all these reasons, any initiatives to facilitate the achievement of such a goal would be very welcome – I mean, enlarging States participation in the collective complaints procedure. I refer, first of all, to initiatives taken by the major institutions of the Council of Europe, like a recommendation of the Committee of Ministers or the Parliamentary Assembly, or some diplomatic action carried out by the Secretary General within the framework of the so-called “Turin Process”.

But I am thinking also of the EU institutions. Considering the fact that 14 out of the 15 States parties to the collective complaints Protocol are EU member States, the EU Commission or the European Parliament, within the framework of their activities under the new European Pillar of Social Rights, could perhaps recommend the other EU member States to follow the positive example of the first 14 States. This would indeed be a concrete way to ensure synergy between the EU and the Council of Europe in the crucial field of social rights.

4) Still concerning collective complaints, let me add that some aspects and certain stages of the procedure can and should be improved, in order to strengthen its quasi-judicial quality or to reinforce its impact on States. I can refer, for example, to: the elaboration of a clearer set of conditions and requirements for the admissibility of complaints; encouraging third party interventions; having more hearings; or – and this would be crucial in terms of improving impact and effectiveness of the mechanism – improving the procedure at the Committee of Ministers stage, in order for the CM to make more effective use of its power to address a recommendation to the State party concerned by a negative decision of the ECSR (in accordance with Art. 9 of the Protocol on collective complaints).

But I am thinking also of envisaging the possibility for the State against which a complaint is lodged to appoint an ad hoc member in the ECSR, in case no national of that State is present in the Committee at that moment.

Or, in a more imaginative way, one could also think of a major reform in the procedure, assigning for example a judicial role to the European Court of Human Rights (a special Chamber of the Court, made competent to decide on social rights complaints), and giving the European Committee of Social Rights a new function, similar to what was formerly the

function of the European Commission of Human Rights, under the old system of the Convention.

5) My further point relates to the other monitoring mechanism, the reporting procedure. Considering the way in which it is organised and implemented, the reporting exercise – on the one hand – requires each year an excessive workload on the part of State authorities and administrations, that have to present detailed reports on policies and practices, legislative and judicial activities, and national social trends, spanning across many different and complicated areas, such as work and employment, social security, social assistance, health care, housing, family protection, and so on. And, on the other hand, it entrusts the European Committee of Social Rights with the impossible task of examining carefully all the reports and to assess the situation in all member States relating to such wide and different areas, in the light of the Social Charter's provisions.

This way of proceeding does not always lead to a satisfactory outcome: in particular, it is not suited to timely identifying the real and most serious problems concerning the implementation of the Charter in each State and, by consequence, it is not sufficiently useful in helping European States to actually improve their respect for social rights.

I see therefore the need to rethink and substantially simplify the reporting exercise, in order to make it more efficient, more meaningful and more useful for an effective protection of the rights enshrined in the Charter.

As you know, I have already submitted some proposals in this respect to the Committee of Ministers some months ago, on the occasion of the exchange of views on 21 March, 2018. I do not want to insist on them; I just wish to point out that any possible changes in the reporting procedure should be aimed, in my view, at making it more targeted, narrowing down the monitoring exercise to topics that require special, urgent or strategic attention.

6) In addition, further simplifications of the reporting procedure should be envisaged for those States that are parties to the collective complaints Protocol. In fact, within the collective complaints procedure, such States are often called to account for facts or situations that have also to be assessed by the ECSR under the reporting procedure. And, the same States have also an additional reporting commitment, since they have to present reports on follow up to collective complaints decisions.

Therefore, also with a view to facilitating further acceptance by States of the collective complaints mechanism, I think that States bound by the collective complaints Protocol should only submit every four years a synthetic and global report on the implementation of all the provisions of the Charter as a whole; and not specific, analytical, reports on each thematic group of provisions of the Charter.

7) Moving to another issue which is crucial in view of improving and updating the ESC system, as an effective instrument for protecting social rights in Europe, today and in the years to come, I would like to highlight the need of extending the personal scope of application of the Charter.

The Appendix to the Charter, as you know, excludes from the protection of the Charter nationals from States non-parties to the Charter, that means nationals from non-European countries, who are lawfully resident and work regularly within the territory of the State – and I stress “lawfully resident and working regularly” within the territory, and not irregular migrants. This very fact is not only an anomaly for a human rights instrument, but is also in itself a serious discrimination, and it is not in line with the spirit of the European Social Charter, which is one of social equality, solidarity and non-discrimination.

Therefore, I cannot but insist in suggesting as an important step forward in the implementation of the rights enshrined in the Charter, the extension by States parties of the personal scope of application of the Charter, so as to include any persons who are legally resident or work regularly within the territory of the State. As the ECSR already pointed out in 2011, such an extension could indeed be achieved without a formal amendment to the Appendix, but just by way of unilateral declarations made by willing States parties, aimed at affirming their intention to extensively apply the provisions of the Charter. Furthermore, this would be fully in line with paragraph 2 of the Appendix, according to which the interpretation of the scope of the Charter set out in paragraph 1 – I quote – “would not prejudice the extension of similar facilities (droits analogues, in French) to other persons by any of the Parties”.

8) Lastly, let me say that if one would really go down the path of giving more relevance and centrality to the ESC system within the Council of Europe architecture, consideration should be given to nourishing the status and reinforcing the composition of the ECSR.

In this respect, I refer in particular to the need for a slight increase in the number of members of the Committee – for example, to possibly 18 (we are now 15, as you know) –, in order both to ensure a better overall balance in the Committee of the different legal traditions and social models in Europe, and to cope with our increasing workload, by allowing further improvement of the Committee’s working methods. This would also provide an opportunity for a revision of the distribution of States in the groups for the election process.

But I refer also to the election of the ECSR members by the Parliamentary Assembly of the Council of Europe, as it is already envisaged in the 1991 Turin Protocol. Or to make the Committee a permanent, or semi-permanent body, and to a possible change of name, from “Committee” to “European Commission of Social Rights”, in order to better identify its special character (as unique quasi-jurisdictional body), and distinguish it from other Council of Europe monitoring bodies.

To conclude, let me come back to the beginning of my intervention, to the social progress objective of the Council of Europe, beyond the functioning and possible improvement of the ESC system, with a view to relaunching such an objective on the occasion of the 70th anniversary of the Organisation.

As you know, some years ago, the 2010 Social Cohesion Strategy of the Council of Europe advanced the need for “society to ensure the welfare of all of its members”. The action proposed to achieve this social progress included reinvesting in social rights and a cohesive

society, as well as strengthening democratic processes and participative decision making and expanding social dialogue and civic engagement. The stated ultimate objective was to build a secure future for all.

Afterwards, something indeed has been done in this direction. In particular, the Organisation has attempted to promote and reinforce the Social Charter system, for example with the collective complaints system, or through the Turin process and the European Social Cohesion Platform. It also proposed in broad and general terms the development of innovative social cohesion policies, but the Council of Europe did not allocate resources to the intergovernmental work capable of delivering those results. In this last respect, one could say that the 2010 Strategy has remained to a large extent unachieved, and its objective – “building a secure future for all” – nothing but an elusive dream.

This would require building again – or reconstructing – robust political support for the social progress objective. Political support from the Committee of Ministers and Member States, as suggested by the Governmental Committee “plac[ing] social rights high on the Council of Europe agenda and ensur[ing] their prominence in the outcome document envisaged for the Ministerial Conference to be held in Helsinki in May 2019”. Follow-up could perhaps involve high-level events, e.g. Ministerial Conferences, or even a social rights or social cohesion summit.

It is indeed necessary to consider and reflect on innovative policies. This requires, first and foremost, recognising the root of the problem – inequality – and the pressing need to somehow re-establish the balance. The notion of universality, indivisibility and interdependence of human rights becomes all the more relevant in the face of inequality. Privileges that stem from unequal opportunities, income or acquired estate may be justified in part, but cannot be considered a hard and fast, absolute or perennial right.

The notion of welfare state and redistribution must be adjusted by introducing better and fairer concepts. Inspired by the idea of universality, indivisibility and interdependence of human rights, it should be possible to develop an alternative win-win approach: whereby each and every human should be better off, by right, not gratuity. As stated in the UN’s Sustainable Development Goals, no one should be left behind. These ideas should also underpin the Council of Europe articulation of social cohesion and social rights.

The Governmental Committee suggested in its document “a process towards elaborating through multi-stakeholder dialogue a common understanding of the social contract fit for the 21st century.” This is an ambitious, yet not less interesting, idea that could be further shaped through a high-level group to animate multi-stakeholder dialogue or process towards elaborating perhaps, as a first deliverable, a “white paper” exploring need, feasibility, options, etc.

In the past, the Council of Europe has worked hard to enhance knowledge about the Organisation among various sectors of our societies and among the public in general. Human rights – mostly in their civil and political dimension – and democracy have been at the centre of those communication policies. There have been excellent examples of Council

of Europe communication, such as the “all different—all equal” or the “no hate” campaigns, to mention just a couple.

Given the centrality of social progress and societal issues (including protection of social rights) in the Council of Europe’s arsenal for securing greater unity between its members, peace (including social peace) and prosperity, isn’t it time to engineer something comparable for the Council of Europe’s social progress objective and the activities that surround it?

The Council of Europe could seek to fund activities in this field through extra-budgetary resources, and by building synergies with other organisations, both governmental and non-governmental. This should also allow bringing the Social Charter and the rights protected under the Charter closer to member States and citizens, assisting national authorities in the development of action plans and implementation of social rights (cooperation and dialogue with national administrations).

But one could also think of other activities, like seeking increased visibility via media and new media, participation in high-level events and global fora, information and campaigns, etc.

And: if there is one area where the Council of Europe could seek to identify one (or more) goodwill ambassador(s) among renowned people of the very highest reputation and who would attract the utmost visibility, it is social rights. This could be an operational option, too.

But all these are just some very tentative ideas and suggestions, and I am not competent enough in this field to develop them further.

Thank you for your attention and patience.