KEY PRINCIPLES OF EUROPEAN SOCIAL HUMAN RIGHTS

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Abstract: The presentation starts with the principles and key treaties of the social human rights of Europe, the European Convention on Human Rights and the European Social Charter, after which some background and value objectives will be discussed. It concludes with an overview of the functioning of the provisions of collective labour law.

I. PRINCIPLES AND LEGAL SOURCES

Human rights are often understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being. Human rights are conceived as *universal* (i.e. applicable everywhere) and *egalitarian* (i.e. the same for everyone), protecting primarily human dignity, freedom and the basic security of citizens. The 1948 UN Declaration of Human Rights was based on all these important principles of human rights, and on the idea of the *indivisibility* of all human rights. Civil, political, economic, social and cultural rights ('CP' and 'ESC' rights) were all included in one document. But let us consider what happened when the norms were made binding.

Both in the treaties of the Council of Europe and later of the United Nations, human rights were divided in two: defensive CP rights and more offensive ESC rights with separate supervisory systems. This followed the Anglo-American and Western understanding that civil rights are individual, binding and *directly applicable* rights, whereas social rights are collective policy principles and not directly applicable as such.

Such an understanding was criticised both by experts and representatives of socialist and Arabic countries. Finally, the World Conference on Human Rights concluded in 1993 that all human rights are universal, indivisible and *interdependent and related*. This statement was endorsed at the 2005 World Summit in New York.[1]

In my book *Social Human Rights of Europe* (2010) I have illustrated the period covering the division of rights as a boat, with two sides, two sails and a leaking prow.[2] Two important steps back to indivisibility were taken with the Additional Protocol No. 12 to the European Convention on Human

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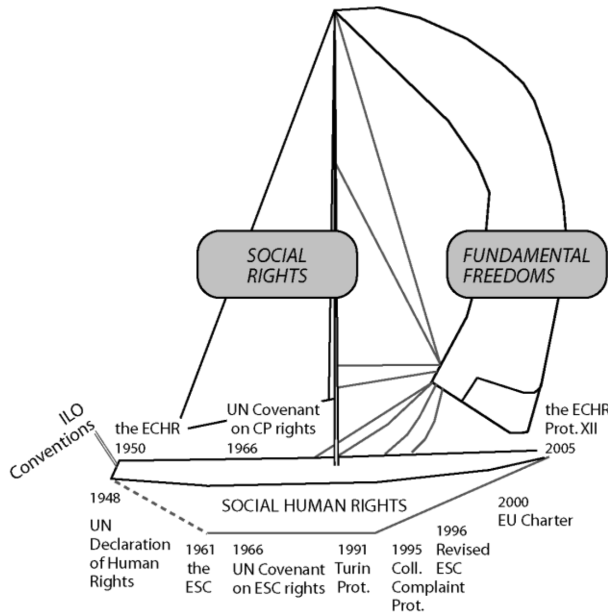
[1] Vienna Declaration and Programme of Action 1993. World Summit 2005 in New York in (para 121).

[2] Mikkola, Matti, *Social Human Rights of Europe,* 2010, p. 58.

Rights concerning non-discrimination (2005) and the European Union Charter (2009) on Fundamental Rights, which leads us to conclude that the problematic division of human rights is falling into the past.

Fig. 1. History of the Social Human Rights Treaties[3]



The Additional Protocol No. 12 to the ECHR on equal treatment, which came into force on 1 April 2005, will increase the overlapping of the two key human rights treaties - the European Convention of Human Rights (ECHR or the Convention) and the European Social Charter (ESC or the Charter) - but it might also give rise to further political debate about the indivisibility and interdependency of these two European “sister” treaties of human rights.

The first of these two European treaties , the ECHR, highlights principles of dignity, liberty, equal treatment and right to justice of citizens whereas the ESC, while overlapping with these principles, also promotes the inclusion of all people into the mainstream of society equal opportunities of all and solidarity both in offensive and defensive meaning, in distribution of increased welfare and in protection against unjustified restrictions. The ESC has an *additional collective element* aimed at promoting and protecting equal opportunities and well-being of people and ensuring the inclusion of all.[4]

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[3] Nice declaration 2000 and the Lisbon treaty 2007 (in force 1.12.2009).

[4] See also: the General Comment 3 of the (UN Committee) CESCR (para 9) on steps “with a view to achieving progressively the full realization of the rights recognized” and (para 10) on the minimum core obligation to ensure the satisfaction of minimum essential levels of rights.

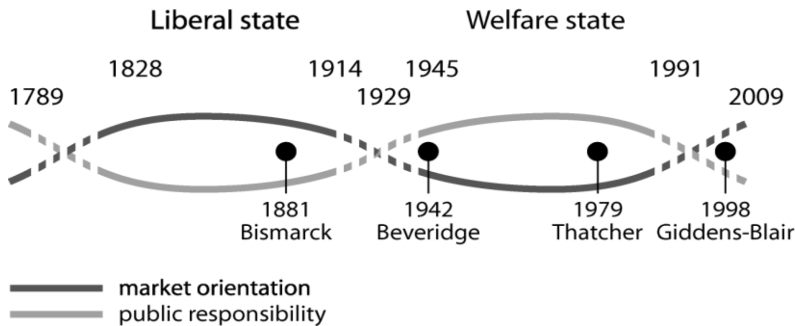
A contemporary synthesis for the purposes of defining human rights might thus consist of a common base of fundamental, universal and egalitarian CP and ESC rights, having an inalienable nature, whilst recognizing the special features of both types of rights. What concerns social rights the last mentioned means promotion also of the collective element.

II. HISTORY AND RATIONALITY

Freedom rights have their origins in the liberal state and social rights in the welfare state. The old (1961) Social Charter functioned as a road map at the dawn of the European welfare states whereas the revised Social Charter (1996) could be understood as a collection of the common minimum standards for an integrated Europe.

The European continent is for the time being, however, facing heavy economic and political pressure from the new economic order of the world, in particular the globalisation of markets and the outcome of neoliberal thinking. I have described the present situation as a transitional period building up to something, but what that something is remains unclear as yet.

Fig. 2. Dominating Ideologies, Transition and Actors of Social Policy[5]



The long-lasting period of liberalism was followed by the creation of welfare states, which was in its most active phase between 1960 and 1990 in Western Europe and during the next two decades in the East. The whole continent has met the challenges of globalisation of markets and emergence of neo-liberal thinking, which started in the UK in 1980s, was adopted next by the post-communist countries in the 1990s and finally entered Western Europe from the mid-1990s on.

So far, transitions between cycles have been slow and fraught with grave consequences.

The transition from oligarchy and mercantilism to the golden period of liberalism started with the French revolution and continued in the form of

[5] Mikkola, Matti, *Social Human Rights of Europe*, 2010, p. 47.

sundry wars and popular uprisings over many decades. The transition from liberalism to the period of welfare states was accelerated by two world wars and a deep depression in between. In turn, the transition from welfare states towards neo-liberalism and competing states has already been in progress for a decade and a half, marked by both armed conflicts and severe economic fluctuations.

New ideas and their creators have been significant in paving the way for striking out in new directions.

The US sub-prime lending triggered the economic crisis in September 2008 and left no regional or local economy untouched. Indebted countries became even more indebted, while countries exporting investment products and services lost export markets. Economic activity fell in the USA and elsewhere, in Europe too, which led to losses in asset value, production, employment and welfare. Welfare states faced the greatest challenge in their history, in some cases leading them to the brink of protracted social instability.

Under our transitional circumstances the defensive profile of both civil rights and the social rights will be emphasised and their overlapping role stressed. One of the clearest examples concern rights to organise, to negotiate and to strike, areas in which both the controlling bodies of the CoE, the European Committee of Social Rights (the ECSR) and the European Court of Human Rights (the ECtHR) have been active lasting recent years.

III. VALUE OBJECTIVES

In developing the case law there is a need for a constant balancing between several apparently polarised values. In the light of the previous definition of the contemporary understanding of human rights, however, they should all be given equal weight.

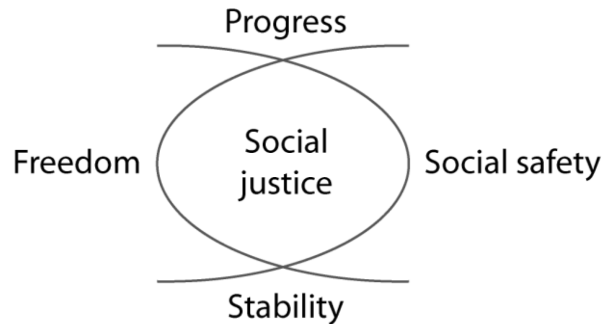
Freedom must not be understood as total liberty which fails to respect the rights of others but freedom in the framework of the legal order, the interests of the whole population and proportionality. Neither must the social and welfare rights be understood as being some kind of outer island remote from the society and economy of the state concerned.

Whether at the societal or individual level, the optimal situation is one where basic freedoms and flexibility, as well as solidarity and security, can be guaranteed simultaneously.

For the simultaneous fulfilment of these two value objectives, a basic prerequisite is that they are not mutually exclusive. On one hand, basic freedoms are no substitute for safety, or efforts in solidarity to satisfy that need. On the other hand, fundamental freedoms are not to be restricted in the name of solidarity, but to be respected in full. In general, neither one is to be restricted unless their exercise violates national security, public health, public interest or the rights and freedoms of others or progress in general, which is provided by both the Charter (Article G) and the Convention (Article 8§2). In this respect, *social justice* could be understood as a situation where

both freedom and solidarity are accorded equal respect. That could be considered as distinguishing an area of *sustainable social justice.*

Fig. 3. Optimal combination of values[6]



In social justice both the basic freedoms and social safety of citizens are attained simultaneously. Neither cancels out the other. Social justice brings about stability in society, but does not prevent society's progress. The more expansive the common ground covered by the two value objectives, the better the society is to live in.

The Finnish philosopher *Pekka Himanen* and his Spanish colleague, the philosopher and social scientist *Manuel Castells,* have summarised the requirements of basic freedoms and solidarity as *creativity* and *caring for the safety of others*. They call the overlapping area of these value objectives *the sphere of well-being*, which is where the capacities of each individual support the development of society.[7] The sphere of well-being lays the foundation for what they called the "*Finnish dream*", as opposed to the vicious cycle of globalisation.[8]

IV. COLLECTIVE RIGHTS OF WORKERS

The *Freedom of association* (Art 11 of the ECHR) and the *right to organise* (Art 5 of the ESC) were not synonyms but in recent years their contents have been converging in the case law of the European Court of Human Rights (the ECtHR) and the European Committee of Social Rights (the ECSR). Both include for the time being the right to associate and act freely, the right to guard one's own interest, to negotiate and to act collectively, when necessary in protection of the rights of the workers. Here the two key treaties and their case law differ little.

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6 Mikkola, Matti, *Social Human Rights of Europe*, 2010, p. 17.

7 Castells, M.- Himanen, P. *The Information Society and the Welfare State: The Finnish Model*, 2002.

8 Himanen, P, and Castells, M, interview in the newspaper Helsingin Sanomat, 29.3.2007.

Viewed historically, the ECSR has led the development of the case law. The key interpretations were arrived at already at the beginning of 1970s.

The *Schmidt and Dahlström* case (1976) was the important case of the ECtHR to clarify the content of the freedom of association but it took several decades for the Court to take the crucial steps and fully recognise the collective rights of workers. Here the ground-breaking case was *Demir & Baykara* in the year 2008. To-day we may state that the right to organise and to guard the interests of workers is a widely recognised and functioning part of the hard core of European human rights. [9]

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his or her interests. With this intention Article 11§1 of the *Convention* ensures the workers:

1) the freedom to organise and to make their own rules but also the right to join or not to join a union;
2) the right to act freely, to guard the interests of the members and the right to be heard (*Schmidt – Dahlström* 1976); and
3) the right to negotiate, to enter into collective contracts and the right to collective action (*Demir and Baykara* 2008).

In the case *Enerji Yapi-Yol Sen v. Turkey*, the Court further developed its case law in relation to the right to strike over the following questions: 1) who is the victim under Article 11, 2) what is the right to strike of civil servants and 3) what are the conditions for restricting a strike?

In this case, the government had interfered in the civil servants planned demonstration and strike action with a blanket ban of such activities and had handed down disciplinary sanctions against members of the board of the applicant trade union.[10]

Article 5 of the Social Charter protects in even more detail workers' right to organise by providing:

1) the *Freedom of association,* but the state is allowed a statute on reasonable minimum membership requirement and possible restrictions are enforceable with respect to the police and prohibition for armed forces;
2) the right to *choose members* and representatives;
3) the right to *affiliate* nationally and internationally;
4) the right to *act freely* and to choose its representatives;
5) the right to *access to the working place* of union officers;
6) the right to *protection of members* against retaliatory measures; [11]

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9 See also: Kaya and Seyhan v. Turkey, Judgment of 15.09.2009 and Şişman and Others v. Turkey, Judgment of 27.09.2011.

10 Enerji Yapı Yol-Sen v. Turkey, Judgment 21 April 2009, pp. 4-5.

11 See also: Akat v. Turkey, Judgment 20 September 2005, where the applicants Alleged that their posts had been transferred because of their trade union members-

7) the right to *join or not to join* the union; and
8) organisation clauses are accepted but *not the closed shop* clause.

V. SOCIAL DIALOGUE AND RIGHT TO COLLECTIVE ACTION UNDER THE ESC

In the Charter the key provision for guarding the collective rights of workers is Article 6. The article includes standards for social dialogue with a right to pursue collective action included:

1) the right to joint consultations;
2) the right to bargain collectively;
3) an obligation to mediation or voluntary arbitration; and
4) the right to collective action.

The right to collective action under Article 6§4 has been understood to guarantee the right to strike granted to any employee, unionised or non-unionised. This provision was the first to explicitly recognise the right to strike in an international convention. It is one of the most significant provisions of the Charter and has generated important case law, which has paved the way not only for the Convention but also for other international treaties and their case law.

As for the ILO, there the right to strike has developed on the basis of the Convention no. 87 as a labour union right to advance employees' socio-economic interests. The EU Charter of Fundamental Rights (2007) further defines strike as a fundamental right of employees of the European Union (Art. 28).

Article 6§4 of the ESC defines strike as a human right and makes it part of the Charter's hard core. Any law that authorises a national judge to determine whether recourse to strike is "premature", is not in conformity with Article 6§4.[12]

Both key legal instruments, the Convention (Art 11§2) and the Charter (Art. G), regulate the possibility of *restrictions* of these rights, if vital public or private interest requires i.e. if the following three conditions are met simultaneously. Firstly, the restriction must be *provided in law,* which 1) should be a clear and concrete norm of a statute, or 2) clearly regulated by the collective agreement, 3) by general case law or 4) by generally accepted doctrine. Secondly, the restriction must be *necessary in a democratic society* in the sense that it concerns *essential services* (services of general economic interest and social services of general interest i.e. essential social and healthcare provision) and guarantees their minimum level of provision (*minimum service*). The state may also legislate on a reasonable *advance notice period* before col-

hip. No violation of Article 11, but the Court was not satisfied that the transfers constituted a constraint or an infringement affecting the very essence of their right to freedom of association, or that they would be prevented from engaging in trade union activity in their new posts or places of work.

12 *Conclusions XVII-1*, Netherlands, p. 319.

lective action starts and a *cooling-off period* to make space for settling the labour dispute.

The third condition is that the restriction has a *justifiable reason* to consider: 1) rights and freedoms of others or 2) public interest or 3) national security or 4) public health or 5) morals.

While allowing exceptions, the interpretation of all these three conditions should be narrow. Economic reasons are not mentioned under the third condition and are alone thus not justified (i.e. sufficient) reasons for restrictions.

VI. JUSTIFIABILITY AND DIRECT APPLICABILITY

Some of the European states' constitutions allow for the direct application of the human rights, in particular if the international norms are clear and substantive enough. These constitutions are described as monoist. Dualist and mixed versions also exist.

Article 1 of the ECHR stipulates that the contracting parties (states) shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of the Convention i.e. the fundamental rights of dignity, justice and freedom. Furthermore under Article 46 the states undertake to abide by the final judgment of the Court in any case to which they are parties, which clarifies the normative effect of the case law as well. It has long been the tradition to respect in particular the last mentioned undertaking.

The direct applications of the Social Charter proceeded, however, slowly. The first applications at national level took place back in the 1980s, but, on larger scale, only after the Charter became an effective legal instrument in 1994.

The Supreme Court of *the Netherlands* was the first to decide on the direct applicability of the Charter as a basis for judgment. It held Articles 6§4 and 31 (Art. G in the Revised Charter) to be directly applicable in the country on the grounds of their wording and on Article 93 of the Constitution of the Netherlands.[13]

The Supreme Court of *the Netherlands* deliberated that the 1983 collective action of the railwayworkers could be considered as a measure towards attaining the right to negotiate. The collective action was aimed at solving a dispute of interest and was within the scope of application of Article 6§4 of the ESC.

On the basis of the Supreme Court's decision, it may be concluded that the courts of the Netherlands must take account of the provisions of the Charter in the evaluation of strikes, at least in the private sector. In practice, the requirement may have been respected only partially.[14]

The *Belgian* Supreme Administrative Court, Conseil d'État, based its decision to overturn an administrative sanction partly on Article 6§4 of the So-

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[13] The Supreme Court of the Netherlands (Hoge Raad), 30. May 1986, NY 1986/688.

[14] Gori, G, The protection of social rights in Europe: changes and challenges, OVS Press.

cial Charter. The sanction was viewed as excessively restricting the workers' right to strike.[15] The Belgian Court of Arbitration (Court d'Arbitrage) has also made a decision that permitted the direct application of Articles 5 and 6.[16] Similarly, it has permitted the direct application of Article 13.[17]

The decision of the Supreme Court of *Norway*, concerning the overturning of the obligation to organise, evoked Article 5 of the Social Charter, which the ECSR has held to be prohibiting such obligations.[18]

On several occasions, the *Finnish* Administrative Courts have held Article 13 of the Charter to be a directly applicable provision.[19]

The Supreme Administrative Court of *Sweden* also evoked Article 13 in a decision to change a previous decision that had denied two persons seeking refugee status the right to a minimum income.[20]

The 1984 decision of the Federal Labour Court of *Germany* consolidated the binding nature of the Charter's obligation on national courts whenever they were to decide on a labour dispute that had no legal grounds in Germany's legislation. The Charter was thus made into a directly applicable secondary source of law. In addition, the Federal Supreme Administrative Court of Germany has also inferred that despite the Social Charter's international law character, its obligations must be taken into account in the exercise of administrative discretion.[21]

The *Italian* Constitutional Court and regional courts have evoked the Charter frequently in the interpretation of national legislation. The Constitutional Court has made reference to:

- Article 8 when evaluating whether the non-entitlement of domestic workers to maternity leave is compatible with the requirements of the constitution;[22]
- Article 15 when requiring development of the right to a pension of persons with disabilities[23]; and
- Article 24 when requiring a strengthening of the period of notice of persons with disabilities.[24]

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15 Conseil d'Etat (VI ch.), 22 Mar. 1995, Henry, No 52424, A.P.T. (1995) at 228.

16 Cour d'Arbitrage, No 62/93, 115 July 1993, M.B. 5/08/1993.

17 Cour d'Arbitrage, No 43/93 of 22 Apr. 1998, M.B., 29 Apr. 1998.

18 Av. Norwegian People's Aid, Supreme Court judgement of 9 Nov. 2001.

19 Scheinin, M., Ihmisoikeudet Suomessa (Human Rights in Finland).1991, pp. 27-30 and pp. 170-171; Gori, G., Domestic Enforcement of the European Social Charter: The Way Forward in Social Rights in Europe (ed. De Burga, G. – De Witte, B.) 2005, pp. 69-88.

20 Högsta förvaltningsdomstol, No. 4642/1989.

21 BAGE 46, 350.

22 Italian Constitutional Court, Judgment No. 86/1994.

23 Italian Constitutional Court, Judgment No. 163/1993.

24 Italian Constitutional Court, Judgment No. 46/ 2000.

Decisions of the regional courts of Italy have included references to Article 3, 4, 11 and 12 in cases of prohibiting non-adherence to a minimum wage.[25]

The Social Charter has thus gained a foothold in the application of the law of several states which are parties to the Charter. Initially, it was applied nationally only in the West European countries, but in 2003, the Constitutional Court of *Romania* made decisions with references to Articles 1, 21, 29 and E of the Charter.[26]

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[25] Regional Administrative Court (TAR) Emilia Romagna, judgment No. 272/2002, para 3.2; TAR Sardinia, judgments Nos. 659 and 660/2003; TAR Sicily, judgment No. 79/2004, para 5. 3.

[26] Decisions of the Romanian Constitutional Court Nos. 24/2003, 25/2003, 108/2003, 351/2003.