

SOCIAL RIGHTS – DEVELOPMENTS

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Abstract

Referring to the social developments in the context of the global economic crisis, the author examines the European Social Charter and other Council of Europe treaties with regard to the continental social model. Ample space is devoted to the European Social Charter revised and its monitoring and control mechanisms and procedures after ten years since it became effective. In this respect, she analyses the status of the various social rights in Romania, in its capacity as State party, since 1999, to the European Social Charter revised; at the same time, she analyses the commitments Romania assumed by ratifying, in 2009, the European Code of Social Security, as well as in its capacity as State party to ILO's Convention No. 102. In conclusion, she points out the need to identify solutions capable to adjust the protection of social rights to the latest developments, avoid deviations and prevent effects highly affecting social cohesion and democratic stability.

Keywords: social rights, Europe, European Social Charter, economic changes

The economic crisis has brought along a reconsideration of the European and the world social policy. Hence, the need for redefining its objectives, while at the same time making use of the existing norms. As numerous experts pointed out, one can speak about a time of social protection restructuring, as well as the capacity to adapt to the new situation. The main requirement consists in finding and using the most adequate means that allow maintaining social cohesion among all members of society, between those who make an active contribution to its progress and those who are totally or partially excluded from the process of finding solutions to the big social and economic problems, between men and women, between generations.

The Council of Europe Parliamentary Assembly pointed out in its Recommendation 1355 (1998): “The Council of Europe is the sole pan-European organization capable of effectively proposing to all the countries of the continent the necessary measures for taking on the challenge of strengthening social cohesion in Europe as a factor of the continent’s democratic stability”.

Obviously, indivisibility of the civil and political rights and of the economic, social and cultural rights is acknowledged in the documents adopted by the Council of Europe and all the other big international intergovernmental organizations, particularly so the United Nations Organization and the International Labour Organization, a specialized UN institution dealing with labour and social security issues, whose founding members include Romania as well. Moreover, at regional level, many of the

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countries belonging to the European Union are parties to the International Covenant on Economic, Social and Cultural Rights which, together with the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights is one of the constituent elements of the International Charter of Human Rights. As a result, the respective countries are bound, by virtue of the international law, to observe and ensure the observance of the economic and the social rights within their national borders.

As far as the Council of Europe is concerned, the European Convention on Human Rights, adopted on 4 November 1950 and in force since 3 September 1953, alongside its additional Protocols, guarantee the civil and political rights, while the European Social Charter, opened for signature on 18 October 1961 and in force since 26 February 1965, was meant to regulate the rights in the economic and social field.

It includes 'a set' of nineteen fundamental rights whose norms refer to labour protection, social protection and the protection of certain categories of persons, which were added, by means of the Additional Protocol of 1988, four more rights.

Also, in time, control upon the observance of the commitments assumed by the Parties was strengthened by means of the Additional Protocol of 1991, which brought along procedural amendments, as well as the provisions of the Protocol of 1995 referring to the establishment of an efficient system of collective complaints.

The developments that have occurred since the Charter was adopted in 1961 are reflected by the European Social Charter revised, opened for signature in May 1996 and in force since 1 July 1999, which also broadened the perception of the economic and social rights. This regional instrument amends and supplements the list of consecrated rights including in a single instrument the rights provided for by the previous documents, as well as a number of new rights.

The Social Charter revised broadens the sphere of the rights that have to be provided for, observed and guaranteed, by including new provisions referring, among other things, to just conditions of work, safe and healthy working conditions, the protection of children and adolescents, vocational training, the protection of working mothers, professional integration, the social integration of persons with disabilities, protection in cases of unemployment, or the procedures to be followed in cases of collective dismissals. One of the new rights it guarantees is the right to dignity at work. Moreover, the Social Charter revised is the first international treaty consecrating the right to protection against poverty and social exclusion, two major violations of human dignity. It is thus for the first time that an international document points out the relation between the social element and human dignity.

This Treaty is progressively substituting the old Treaty of 1991; nevertheless, the States are not bound simultaneously by commitments at different levels. Once a State Party has acceded to the Charter revised, application of the initial Charter and its Additional Protocol is terminated.

In time, the European Social Charter proved to be a particularly important instrument for the following reasons:

- The document has a large area of application, bearing in mind that, at present, 47 countries on the Continent belong to the Council of Europe. The composition of the Council of Europe is much larger as compared to the European Union, and the lead is going to last for a long time.

- The Charter protects, by its provisions, a large range of social rights, their number having been increased from 19, as were in the initial text adopted in 1961, up to 31.

- The Charter is more than a mere text including a list of rights or provisions referring to the level of the protection to be ensured. It is a legally binding Treaty, under which the Contracting Parties, upon ratification, accept to be subject to a control mechanism by which, based on the reports submitted by each country, the independent experts appreciate the way each country observes the assumed provisions.

- It is a reference legal instrument. The conclusions and the actual effects of the control mechanism can entail modification of the legislation or the practice in the Council of Europe Member States. As a matter of fact, implementation of the revised control mechanism opens new possibilities of progress with the protection of the fundamental human rights under the national legislations, which have to take into account the remarks and, implicitly, the recommendations made by the experts.

- It proves to be a genuine driving force for important social changes and the progressive implementation of all the provisions, observance of the assumed obligations and progress with broadening the commitments area.

- To the countries not belonging to the European Union, the Social Charter is the most comprehensive treaty protecting human rights in all social fields. Even for the European Union Member States the document provides, in certain fields, a better level of protection than the Union's norms do.

Obviously, the Charter is a perfectible legal instrument. What matters is that, by its contents, by the means it enshrines so that its provisions shouldn't remain just empty words, the European Social Charter offers the way and the framework that ensure a broader protection of human rights.

The reader of the European Social Charter, particularly in its revised form, will find that the document mainly consists of two parts. The first one could be labeled as a political instrument of social development, while the

second part is, as many experts view it, a binding legal instrument. They are, of course, two complementary parts making up a whole that includes a wide range of rights as well as a system of accepting the Charter's content, which allows the Contracting Parties and the control bodies established by the Council of Europe to evaluate in time the way commitments are made and observed, while leaving an open 'gate' for new provisions to be laid down, accepted and observed. As a matter of fact, it is precisely such flexibility that allowed for the revision of the European Social Charter. And such operations are likely to happen again.

It is worth mentioning the originality of the Social Charter, also consisting of the instituted control mechanism, one of a political, not jurisdictional nature where, as shown before, four bodies come in successively: the European Committee of Social Rights, the Governmental Committee, the Committee of Ministers and the Council of Europe Parliamentary Assembly. The main 'part' of the system is the European Committee of Social Rights. Established under art. 25 in the European Social Charter, it performs its activity in control cycles.

It is worth mentioning that the international control procedure is applied in conformity with the one resulted from the modifications included in a Protocol adopted in 1991 and made effective as a result of a decision by the Committee of Ministers. On 9 November 1995, the Additional Protocol referring to the collective complaints system (STCE No. 158) was opened for signature. The document was meant to increase the effectiveness of the Social Charter control mechanism by adding the complaints referring to violations of the Charter's provisions to the examination of the governmental reports. Ratification by five countries was required for the Additional Protocol to come into force, on 1 July 1998.

In September 1996, the Committee of Ministers adopted a new system for the presentation of reports according to which the countries under control shall submit reports referring to the observance of the same provisions and for the same period of time. Actually, in terms of the regulated rights, the Charter's provisions were divided into two categories: those belonging to the so-called 'hard core' and those outside this category, respectively. The first group includes the provisions of arts. 1 (the right to work), 5 (the right to organize), 6 (the right to bargain collectively), 12 (the right to social security), 13 (the right to social and medical assistance), 16 (the right of the family to social, legal and economic protection), and 19 (the right of migrant workers and their families to protection and assistance). The second one includes arts. 2 (the right to just conditions of work), 3 (the right to safe and healthy working conditions), 4 (the right to a fair remuneration), 9 (the right to vocational guidance), 10 (the right to vocational training), and 15 (the right of persons with disabilities to independence, social integration and participation in the life of the community) in the European Social Charter, as well as art. 3 (the right to take part in the determination and improvement of

the working conditions and working environment) in the Additional Protocol to the Charter adopted on 5 May 1988.

While the reports on the observation of the provisions laid down in the hard core were to be submitted on 30 June of odd-number years and referred to a reference period of two years, those regarding the provisions outside the 'hard core' were to be submitted on 31 March of even-number years and present each time the situation related to the observance of half the number of articles, with a reference period of four years. In case the State so wishes, these reports can be presented together with those regarding the observance of the provisions included in the 'hard core'.

Three stages can be distinguished with the procedure:

I. The first stage is evaluation by the European Committee of Social Rights of the reports presented by each country subject to control, a process by which the conformity of the national legislation and practice with the provisions of the Charter accepted by the reporting country is evaluated. The Committee can ask each country additional questions or one to several 'general questions' in case the issue that needs clarifications concerns all Contracting Parties.

The conclusions can be:

- negative, in case it is appreciated that a Contracting Party's legislation and/or practice fails to observe, partly or totally, one or several previously accepted provisions of the Charter;
- positive, in case the situation is found to be satisfactory;
- postponing the decision, in case not all the data needed for making a decision are available.

II. The second stage is examination by the Governmental Committee of the texts of the national reports and the European Committee's conclusions. This body shall convene at least twice a year and includes one representative for each country. They prepare the texts of the Committee of Ministers' decisions and select, based on social and economic policy reasons, the situations that should, in the opinion of the Governmental Committee, be the object of the recommendations the Committee of Ministers makes to the Contracting Parties.

III. The third stage is an examination by the decision-making body of the Council of Europe, the Committee of Ministers – whose structure includes one representative of each Council of Europe Member State, usually the Foreign Affairs Minister – of the Governmental Committee's report.

Bearing in mind the Governmental Committee's preliminary report, the Committee of Ministers takes to voting in order to adopt a general resolution regarding the entire control cycle and address individual recommendations to the Contracting Parties.

According to the situation of 4 May 2009 regarding the signing and ratifying processes of the Council of Europe Conventions, the European Social Charter revised (STCE No. 163), in force since 1 July 1999, had been

ratified by 27 of the 47 Council of Europe Member States, and signed without ratification by another 16 States. The only Member States that haven't affixed their signatures are Croatia, the former Yugoslavian Republic of Macedonia and Switzerland.²

The new Treaty was signed by Romania on the occasion of the Colloquium on "The Social Charter of the 21st Century", held in Strasbourg on 14-16 May 1997, and ratified in May 1999. The ratification moment significantly coincided with the 50th anniversary of the Council of Europe. Having met the required number of ratifications, three, the Charter came into force on 1 July 1999.

According to the Ratification Act³, Romania ratified the European Social Charter revised (art. 1), with the following declarations:

"In accordance with the provisions of Article A, paragraph 1, of Part III of the Charter, Romania accepts Part I of the Charter as a declaration of the aims which it will pursue by all appropriate means and considers itself bound by the provisions of Article 1; Articles 4 - 9; Articles 11, 12, 16, 17, 20, 21, 24, 25⁴, 28 and 29, as well as, moreover, by the provisions of Article 2, paragraphs 1, 2, 4 - 7; Article 3, paragraphs 1 - 3; Article 13, paragraphs 1 - 3; Article 15, paragraphs 1 and 2; Article 18, paragraphs 3 and 4; Article 19, paragraphs 7 and 8, and Article 27, paragraph 2.

Romania declares that it accepts that the application of the legal commitments contained in the European Social Charter (revised) is subject to the control mechanism provided for in Part IV of the European Social Charter adopted in Turin, on 18 October 1961" (art. 3).

The Annex, which an integer part of the Law, actually lists the Romanian institutions having powers with the implementation of the European Social Charter revised.⁵

² The most recent ratifications: Hungary (20 April 2009) and Slovakia (23 April 2009).

³ Law No. 74/3 May 1999 on the ratification of the European Social Charter revised, adopted in Strasbourg on 3 May 1996. The ratification instrument, No. 490, was deposited on 7 May 1999.

⁴ In a Note Verbale from the Permanent Representation of Romania, dated 16 April 2004, registered at the Secretariat General on 21 April 2004, Romania declared that art. 26 shall be read art. 25, which had not been notified at the moment the ratification instrument had been deposited.

⁵ Ministry of Labour and Social Protection; Ministry of Foreign Affairs; Ministry of Justice; Ministry of National Education; Ministry of Youth and Sports; Ministry of Public Works and Land Arrangements; Ministry of the Interior; Ministry of national Defence; Ministry of Culture; Ministry of Transports; Ministry of Industry and Trade; Ministry of Finance; Child Protection Department; State Secretariat for People with Disabilities.

On ratifying the European Social Charter revised, Romania accepted 65 of the 98 paragraphs of the Treaty, without being bound by the collective complaints procedure.

As far as the unaccepted provisions are concerned, on 6 May 2009 the European Committee of Social Rights (ECSR) held in Bucharest a meeting with the Romanian Government's representatives.

According to art. 11 in the Constitution, "the Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party to (1). Treaties ratified by Parliament, according to the law, are part of national law (2). If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution (3)".

In 2001-2008, eight reports on the implementation of the provisions of the Charter revised were submitted. The second Report on the implementation of the Charter revised, presented by Romania on 3 February 2008, referring to the thematic grouping "Employment, training and equality of opportunities" for the period 1 January 2005 – 31 December 2006, was the first to be elaborated in conformity with the new system of reports adopted by the Council of Ministers in its 963rd Meeting of Ministers Delegates, on 3 May 2006 (applicable periods of reference: 1 January 2003 – 31 December 2006 for art. 18, and 1 January 2005 – 31 December 2006 for arts. 1, 9, 15, 20, 24, and 25).

Romania's Report of 15 January 2009 referred to art. 3 paragraphs 1, 2 and 3, and arts. 11, 12 and 13, paragraph 1 – health, social security and social protection respectively.

On 30 November 2009, Romania registered at the Social Charter Secretariat its ninth Report on labour-related rights (arts. 2, 4, 5, 6, 21, 22, 26, 28 and 29) for the period 1 January 2005 – 31 December 2008).

According to ECSR's conclusions, which legally appraise the conformity of the national situations with the Charter's provisions and adopts conclusions in the framework of the report submitting procedure, Romania achieved progresses, including:

- In the field of health: elaboration of a list of occupations or activities that involve a reduction of the workday for reasons of health risks, with the modification in 2003 of the Labour Code; limitation of publicity and selling of tobacco products, by means of Law No. 148/200, as well as measures to prevent and combat the adverse effects of smoking (Law No. 90/2004);
- In the field of the rights of the child and the adolescent: a wide range of measures adopted under Law No. 272/2004 was implemented by the National Authority for the Protection of the Rights of the Child; also, the Government approved in 2004 the National Plan of Action for the elimination of child labour (Government Decision No. 1769/2004) and prohibited, under Law No. 678/2001, child trafficking for whatever

exploitation, the sexual one included; Law No. 217/2003 on preventing and combating domestic violence;

- Equality and non-discrimination: prohibition of discrimination at work (Ordinance No. 137/2000, amended by Law No. 48/2002), of any gender-based discrimination with the access to social security services (Law No. 76/2002) as well as with every aspect of the professional life, with the introduction of the right to equal salaries for equal work (Law No. 202/2002), prohibition of any discrimination at work for reasons of disabilities (Labour Code revised), and exemption of income taxes in favour of persons with disabilities employed on a contractual basis (Law No. 519/2002).

- Right to work and correlated rights: regulation of the various types of labour contracts (provisional, part time, work at home, predefined period) under the Labour Code modified in 2003; the right of any employee to establish or join a union without restriction, particularly related to nationality or previous authorization (The Union Act No. 54/1991 modified in 2003); guaranteed union-related rights for public servants (Law No. 344/2002 on the status of public servants); employees' right to a compulsory 42 days' postnatal leave (2003); workers' right to protection of the debts owed to them in case of their employer's insolvency, by instituting a guarantee fund.

On the other hand, non-conformity cases, which should stay monitored until they are solved, were found in relation to such rights as:

- Right to health and safe working conditions (regulation): lack of coverage for freelancers and housekeeping workers (art. 3.2);

- Right to access to health: high rates of child and mother deaths (17.3 deaths with 1000 babies born alive in 2002) and the alarming conditions in certain psychiatric hospitals (lack of resources and ill-treatment cases) (art. 111).

Other cases refer to the unsatisfactory level of family services (art. 16 – family rights), the minimal salary (art. 4.1), the 15 days' notice in case of dismissal irrespective of seniority (art. 4.4), education and vocational training of persons with disabilities, the impressive number children with disabilities not enrolled in schools (art. 15.1), the practice of child labour through the literal application of the legislation (arts. 7.1 – 9), or the practice of poorly informing the employees' representatives in cases of collective dismissals (only the reason and the number) as well as the lack of provisions related to the sanctions to be applied in cases of failure to observe the provisions related to consultations (art. 29).

Romania became a party to two other conventions in the field of social rights, namely, Convention No. 102/1952 of the International Labour Organization on the minimal norms of social security, ratified under Law No. 115 of 24 April 2009, and Council's of Europe European Code of Social

Security, adopted in Strasbourg on 16 April 1964 and in force since 17 March 1968, ratified under Law No. 116 of 24 April 2009.

There is a close connection between the two instruments, one universal and one regional, respectively, on the one hand, and the European Social Charter revised, ratified by Romania under Law No. 74/1999 and in force since 1 July 1999, on the other hand.

Thus, article 12 paragraph 2 of the Charter stipulates that the Contracting Parties commit themselves to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security.

Following the general provisions included in Part I, Parts II – X refer to nine traditional branches of social security, namely, medical care (II), sickness cash benefit (III), unemployment benefit (IV), old-age benefit (V), work accident and occupational disease benefit (VI), family benefit (VII), maternity benefit (VIII), invalidity benefit (IX), survivor's benefit (X) while each specifies the risk it covers, the protected persons, the benefits to be granted, eligibility conditions, the benefit quota, the period of time during which it is granted and the duration of the waiting periods.

Other two parts refer to the calculation of the periodic payments and establish the percentages of the salary income achieved before the occurrence of the risk to be covered by the periodical payment (Part XI) and, respectively, its basic value when the payments are suspended, including the procedure for the exercise of the right to appeal and the rules governing the financing and the management of social security systems (Part XII).

The Code, which Romania signed on 22 May 2002, is to be ratified after the States have accepted the obligations provided for in Part I – General Provisions, Part XI referring to the calculation of periodical payments, Part XII including common provisions corresponding to those Parts from II to X specific to each insurance branch whose obligations they accept, and Part XIII – Miscellaneous Provisions.

It is worth mentioning that the procedure confers the Code a high degree of flexibility for it allows States to ratify it even though the required level hasn't been attained in certain branches.

For instance, the provisions in Parts II – X are not all compulsory but six of them, under such circumstances that the part referring to medical care (II) counts as two parts while the one referring to the old-age benefit (V) counts as three parts.

As far as the control mechanism, regulated under arts. 74 and 75 of the Code, is concerned, the Code provides for the obligation of annual reports to be submitted to the Council of Europe Secretary General, elaborated on the basis of printed forms specifying the information and the statistic data to be communicated.

So far, the European Code of Social Security has been ratified by 20 States, among which, recently Romania, which shall have to submit annual

reports on the fulfillment of the standards included in the Parts it ratified, namely, Part II – Medical care, Part III – Sickness cash benefit, Part V – Old-age benefit, and Part VIII – Maternity benefit and their corresponding provisions.

Moreover, the annual report, possibly accompanied by other information as well, shall be also submitted to the Director General of the International Labour Organization, who in turn forwards it to the Committee of Experts on the Application of Conventions and Recommendations, ILO's competent body, who examine it and formulates conclusions.

In fact, this is an associated control system between the Council of Europe and the International Labour Organization. The explanation lies in the nature and the origin of the Code and the fact that this treaty was elaborated based on the provisions of ILO's Convention No. 102/1952 on the minimal standards of social security, an organization which, as a matter of fact, took active part in the elaboration activity.

It is worth mentioning that the two instruments, the Convention and the Code, have an almost identical content and have been ratified, in general, by the same States. This is the reason why they were ratified by Romania on the same day (24 April 2009) and symmetrically in terms of the Parts it committed itself to be bound to.

Ten years ago, giving a reply to those using the pretext of economic globalization and the trend to remove regulations in order to invoke a claimed contradiction between social rights and the market economy, Pierre-Henri Imbert, in his capacity as Director of the Council of Europe Human Rights Directorate, warned about the fact that a re-thinking of our democracies was necessary, for “the social is a necessary component element of economic growth and development, as well as one foundation of democracy; the Social Charter, a minimal base acknowledging and safeguarding the fundamental rights, cannot therefore be an obstacle against development or the market economy, since it has to do with what is fundamental, while a Europe of human rights would be unaccomplished without this social dimension”.

These words have kept their vividness undeterred and this is the reason why they should be reasserted and, above all, taken into account for the elaboration of policies and strategies in this period of economic crisis as well as in the future.

The notion of globalization refers to a series of changes at global scale that radically modified our lifestyle and our economic activities: international economic relations grow more and more important, thereby leaving an ever stronger imprint on the relations characterizing the domestic markets; economic competitiveness on the global market is the measure of a society's success; the factors of production – the capital and the labour – are characterized by different mobility and dynamism; the new technologies modify the working methods and relations; the economic, social and cultural

sectors of national societies, which are influenced by globalization, evolve unlike the traditional social structures and categories.

In numerous countries, the high unemployment rate is the expression of a structural crisis that is undoubtedly the result of the new conditions characterizing the world's economy, but is at the same time the sign of a divorce between the economic growth and the development of the labour market, a sign that the relations among the factors of production have changed, human work being of lesser importance, a sign of the mutations having occurred with the economic systems and the demand for consumption. The notion and the reality of work have started to change. A lifetime work is being substituted by a multiple career; new working environments are being created as a result of the fact that atypical activities (temporarily labeled as such) are emerging and evolving and so is remote work as well. The training of the young who enter the 'work world' becomes more and more important, but it proves insufficient to guarantee the conservation of work; they are workers who never cease to acquire new qualifications.

The demographic evolution shows that Europe is characterized by the increasing importance of elderly persons, a process that entails more and more difficult problems in terms of pension systems, irrespective of how they are organized, as well as in terms healthcare systems. The European societies should undertake such responsibilities in new and efficient ways, based on their social traditions and the observance of the obligations assumed under the treaties. Noteworthy changes have occurred in the structure of families as well. One can notice, on the one hand, that the number of one-child families is increasing, while on the other hand, the number of one-parent families is also increasing, most often the parent looking after the child being the mother. Problems are also arising in terms of the cohabitation of generations. This is not only about the structural change of society, a differentiation and a fragmentation of the various lifestyles, but also a phenomenon bringing new, additional challenges in front of the social systems.

Bearing in mind these considerations, two conclusions come out. The first is that, given the economic changes, the present and the predictable ones, it is clearer than ever that social rights necessarily complete the civil and political rights. Secondly, in the framework of a globalized and rapidly evolving economic system, social policies have focus, at the national and the international levels, on finding those forms that are most effective. They have to find the most effective forms of organization in terms of distributing the outcome of work among the employees, the social norms and profit.

From the point of view of a global society, we are facing the alternative of either jeopardizing social cohesion or using the opportunity of a new social status.

The causes and the effects of the new economic and social challenges are national and international. The multitude of levels of economic development, the balance between each country's mobilization and international interdependence, call for adequate responses and strategies.

For the entire continent, the European treaties are a reference framework and that 'base' indispensable for the elaboration of new instruments – legislative and contractual, national and European – capable to facilitate the diminution of the adverse effects, at economic and social levels, entailed by the mutations under way, as well as capable to prevent unfavourable consequences with a high degree of effectiveness.