Conference "50 Years of the European Social Charter:
Accomplishments and Social Challenges for Croatia and Europe"
(organized by Pragma under the auspices of the President of the Republic of Croatia and the Ministry of Economy, Labour and Entrepreneurship)
Zagreb, 11 November 2011

"The European Social Charter and Social Rights in Europe"

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I. The European Social Charter: the most important pan-European treaty of social rights within the European System for the Protection of Human Rights

First of all, it is worthwhile to recall that, like the European Convention on Human Rights, the European Social Charter derives from the Universal Declaration of Human Rights. Both the Convention and the Charter were adopted within the Council of Europe (currently composed of 47 member States) in order to effectively guarantee both civil and political as well as social rights. Both the Convention and the Charter are international treaties and, obviously, they are legally binding. Both established specific monitoring bodies (the European Court of Human Rights and the European Committee of Social Rights) to ensure such a compulsory character and effectiveness.

Of course, the European Convention is the most symbolic treaty of the Council of Europe, but the Social Charter is the most important social rights treaty of the organization. In fact, the European Convention was not conceived as a social rights instrument: in this sense, it explicitly excluded in general this category of fundamental rights, even if at the same time it included several rights having a mixed nature such as the right to organize or prohibition of forced labour, which - by the way - reinforce the idea of indivisibility. In parallel, the European Court is considered the flagship of the Council of Europe, but it was not conceived as a European jurisdiction of social rights: the Committee modestly and increasingly tries to play this role.

From this point of view, the doctrine sometimes has "accused" the European Court to exercise some "self-restraint" when dealing with social rights cases, e.g. in the field of rights of persons with disabilities or the fight against poverty and social exclusion. It is not my task today to defend the Court. However, the doctrine is also responsible for expecting too much of the European Court. Clearly, the social jurisprudence of the Court is valuable. Nevertheless, this "dynamic" and "evolutive" jurisprudence has its limits in the Convention text (e.g., the Convention does not have provisions similar to Articles 15 or 30 of the revised Social Charter), even when taking into account the potentialities of Protocol No. 12 on non-discrimination.

In this line of reasoning, the Social Charter and the case law of the European Committee of Social Rights are resources to be exploited. At the

University level, when organizing colloquies or promoting research on social rights in Europe, we are accustomed or there is a tendency towards exclusively focusing on the "social case law of the European Court of Human Rights" and sometimes on the "social case law of the Court of Justice of the European Union", by forgetting the specific "case law of the European Committee of Social Rights". In the case of the European Court of Justice, this social jurisprudence (undoubtedly important in some respects) has also been limited by the text of the founding treaties and their amendments, even if such limits might be potentially overcome after the entry into force of the Lisbon Treaty (and, with it, of the Charter of Fundamental Rights of the European Union).

With these premises, while recognizing the essential tasks performed by both European Courts, the neglect of the Social Charter and the Committee of European Social Rights among the activities and priorities of University researchers is not justified at all. Such exclusion of the Charter and the Committee is detrimental to the effectiveness of social rights and, therefore, to the many persons entitled to exercise them in their daily lives. With this spirit, I would like to reiterate my gratitude to the pedagogical, promotional and practical efforts made by NGOs (in our case, Pragma) in favour of the Social Charter and the Committee.

From this perspective, I think today is not my task to defend the European Committee of Social Rights, even if - consistently - I may take advantage of my position and I feel the moral obligation to promote the role of the Committee in ensuring the effectiveness of social rights.

In this context, the argument not to "mix" the Committee with the two European Courts is based on the fact that the Committee does not formally have a judicial character to take part in the European judicial dialogue in the field of social rights, as well as to the fact that the Committee does not formally deliver "judgments" but "decisions", the legally binding character of which might be put into question. In my view, this argument is unpersuasive for several reasons:

- firstly, not only the European Convention on Human Rights and the European Union Treaties, but also the European Social Charter is an international treaty whose compulsory character is likewise undisputed under the 1969 Vienna Convention on the Law of Treaties;

- secondly, the European Committee of Social Rights is the final interpreter of the Social Charter, like the European Court with regard to the European Convention or the Court of Justice in relation to European Union Law;

- thirdly, the enforcement and interpretation of international agreements in good faith implies that the Charter, the Convention or the European Union treaties are not only composed by the text of each treaty but also by the case law which derives from their respective final interpretation (jurisprudence comes from "juris-dictio", which means "to say the law");

- fourthly, the above reason is easily understandable, since the text of the Social Charter, as such, from a regulatory point of view contains general clauses which are logically and usually improved by more detailed national legislation;

-fifthly, in connection with the last reason, the Social Charter is a "living instrument" whose ultimate meaning is achieved through the interpretation made by the Committee and, of course, respected in practice at the domestic level. Many examples of conclusions and decisions of the Committee implemented by national authorities could be mentioned. The problems concerning the

implementation of the decisions of the Committee are also common with judgments of the European Court and, in case of non-execution of these judgments we do not say that they are not mandatory.

After providing these theoretical and practical reasons, we are able to approach social rights in Europe under the Social Charter in terms of synergy with how social rights are dealt with under the European Convention and EU law, all within the framework of the European System for the Protection of Human Rights.

II. Positive assessment of 50 Years of the European Social Charter

As is well known, the Social Charter of 1961 recognized a first list of social rights related to work and non-discrimination, social protection and vulnerable people, as well as the so-called reporting system as a mandatory monitoring mechanism. In its evolution during these 50 Years, the Charter has been improved both from the catalogue and the protection mechanism perspectives. In 1988, a first Protocol extended the range of protected social rights. In 1995, another Protocol established a collective complaints procedure to strengthen the level of guarantees.

Then, in 1996 the revised Charter, on the one hand added other important rights (in some cases under the positive strong influence of International NGOs - e.g. in the new version of Art. 15 concerning persons with disabilities or in the elaboration of Arts. 30 and 31 on the protection against poverty and social exclusion as well as the right to housing) and, on the other hand, established a consolidated version of the Charter including the whole catalogue of rights and the clauses incorporating the two mechanisms (national reports and collective complaints).

At present, among the 47 member States of the Council of Europe, 43 have accepted the Social Charter, 11 are bound by the 1961 original Charter and 32 by the 1996 revised Charter (after its ratification by FYROM last October). And only 14 have accepted the collective complaints procedure. As far as Croatia is concerned, it ratified the 1961 Charter and the 1995 Protocol providing for a system of collective complaints in February 2003; it signed the 1996 revised Charter in November 2009 but has not yet ratified it.

Having said that, the best way to illustrate the positive assessment of these fifty years is to show the effectiveness of the Social Charter by providing examples of implementation of the conclusions elaborated by the Committee under the reporting system and the decisions taken in the framework of the collective complaints procedure.

According to the original reporting system, States Parties were supposed to submit a national report every two years on the implementation of the accepted provisions. After the accession of Central and Eastern European countries to the Council of Europe as well as the adoption of the 1996 revised Charter, the workload for both States to report and the Committee to assess national situations increased significantly. That led the Committee of Ministers to modify the system of reporting, so that States Parties had (from 31 October 2007) to present a report annually only on one of the four parts (“thematic groups”) into which they the provisions of the Charter were divided: “employment, training and equal opportunities” (group 1), “health, social security and social protection” (group 2), “labour rights” (group 3) and “children, families, migrants” (group 4). In this way,

each provision of the Charter is reported on once every four years which means that, while alleviating the workload somewhat, it is clear that sometimes the conclusions of the Committee risk becoming quite slow and ineffective if, e.g., changes in domestic legislation and practices have intervened between each supervision cycle.

The national reports are presented following an official form established by the Committee of Ministers of the Council of Europe which includes questions concerning the legal framework and effective implementation of the Charter (national judicial decisions, actions plans, pertinent figures and statistics, etc.) allowing for a legal assessment (in law and in practice) by the European Committee of Social Rights. These reports are also communicated to the most representative social partners at the national level, as well as to international NGOs having participatory status with the Council of Europe: unfortunately, in practice those national and international organisations are not very active in sending comments on the state reports. Apart from that, as national reports are published on the website of the Social Charter, any national organization may submit to the Department of the Social Charter relevant information to supplement or contradict the state reports, and the Committee could eventually take them consideration when assessing the national situation concerned.

Let me mention some examples of progress achieved in the application of social rights under the Social Charter to implement the conclusions adopted by the Committee: a) Spain changed in 1990 its Law on Education by raising the age of compulsory education to 16 years to avoid the gap between the previous age (14 years) and the minimum age (16 years) to have access to the labour market; b) in Denmark, the Children Act No. 460/2001 introduced new paternity rules and abolished the distinction between children born out of wedlock and legitimate children; c) after verifying that night-work and access to dangerous occupations was prohibited to women in general in Croatia, new labour legislation repealed this prohibition (with certain exceptions relating to maternity) entered into force in January 2010; d) in Turkey, the constitutional amendments adopted in 2010 granted civil servants the right to collective bargaining.

What about the collective complaints procedure? It has profoundly changed the image of the Committee, whose functions are becoming more and more judicial. The independence and impartiality of the Committee and of its members, its methods of interpretation, the format of its decisions, the external impact of its case law and the examples of implementation of its decisions confirm this increasingly judicial image. The collective complaints procedure is adversarial in nature and guarantees due process of law. It also provides for the possibility of holding public hearings. By the end of 2011, 74 complaints have been registered (since the entry into force of the procedure in 1998). The average duration of the admissibility stage was 4-5 months, while the average duration of the phase on the merits was less than 11 months. This represents a very reasonable duration of the procedure. Unfortunately, it is evident that in many cases, including cases of serious violations of fundamental rights, it may take a substantial amount of time before actual measures are taken to remedy the situation.

The increasing number of collective complaints is the result of the still more active involvement of social partners and civil society organizations. Organizations entitled to intervene in the collective complaints procedure have a crucial role to

play in filing serious complaints that, in turn, induce the respondent governments to take a serious approach and to provide pertinent responses.

Indeed, the practice shows significant examples of national implementation by *legislative authorities* (Complaint No. 48, *European Roma Rights Centre v. Bulgaria*: amendment of the Social Security Act in order not to suspend or suppress access to unemployment benefits to people in precarious situations), *executive authorities* (Complaint No. 45, *Interights v. Croatia*: withdrawal from the educational system of a textbook containing discriminatory statements on the grounds of sexual orientation) *or judicial authorities* (Complaint No. 14, *International Federation of Human Rights Leagues v. France*: enjoyment of the right to medical assistance by children of illegal immigrants - French State Council - or several recent complaints against France on annual working days system, the so-call, “forfait en jours”, and the on-call periods - French Court of Cassation).

These examples, concerning both the reporting system and the collective complaints procedure, give visibility and credibility to the work of the European Committee of Social Rights and they demonstrate that the Charter is a binding and living instrument. Anyway, these positive examples are not the outcome of the exclusive tasks performed by the Committee and the Department of the Social Charter, but also of the interaction and collaboration of national authorities and civil society organizations.

Furthermore, the impact of the case law of the Committee is more visible when such an interaction also occurs within the European human rights system. For example, the European Court of Human Rights has referred to the Committee’s work in important cases revealing synergy or convergence of legal reasoning (*Judgment Sørensen and Rasmussen v. Denmark* of 2006, in which the Court has assumed the interpretation of the Committee in relation to closed-shop clauses) or in cases involving an evolutive interpretation of the European Convention on Human Rights in line with the Charter (*Judgment Demir and Baykara v. Turkey* of 2008, in which the Court founded its conclusion in the case law of the Committee on collective bargaining of civil servants). Correspondingly, in developing its case law, the Committee is often inspired by the case law of the European Court of Human Rights (e.g. several decisions on the merits in complaints dealing with corporal punishment inflicted to children as well as in complaints dealing with non-discrimination against Roma).

In some areas the Committee also takes into account the case law of the Court of Justice of the EU if it develops favourable standards to be adopted under the Charter (e.g. with regard to the right to information and consultation within the undertaking). By contrast, the Court of Luxembourg has not until now been open to the case law of the Committee, even if from a normative perspective the drafting of the catalogue of social rights of the Charter of Fundamental Rights of the European Union (according to the explicit Explanations of the Praesidium appended to it) was based on the 1996 revised Social Charter. Moreover, since the 1986 Single Act, the Social Charter is explicitly mentioned in the European Union treaties as a source of interpretation of fundamental rights within the Union.

III. Critical and pending aspects

In this section I would like to introduce a constructive approach to critical and pending aspects, by referring to two issues:

A. On the one hand, how to improve the implementation of the Social Charter from an internal point of view in order to reduce or prevent some inconsistencies, that is to say:

- to approach the three pillars of the Council of Europe (rule of Law, democracy and human rights) in terms of "social State, social democracy and social rights", which means to impose the acceptance of the Social Charter (as is the case for the European Convention on Human Rights) as a necessary condition of membership in the Organization (the countries not having yet accepted the Charter are Liechtenstein, Monaco, San Marino and Switzerland);
- to overcome the "à la carte" system of acceptance of the provisions of the Social Charter: the practice has shown that "the Charter was conceived as a whole and all its provisions complement each other and overlap in part. It is impossible to draw watertight divisions between the material scope of each article or paragraph (…). This is the case with education. The Committee considers that the fact that the right of persons with disabilities is guaranteed by Article 15§1 of the Revised Charter does not exclude that relevant issues relating to the right of children and young persons with disabilities may be examined in the framework of Article 17§2" (Decision on admissibility of 26 June 2007 in Complaint No. 41/2007, *Mental Disability Advocacy Center v. Bulgaria*).
- to definitively move from the 1961 Charter to the 1996 Revised Charter, which is even more consistent with the current national legislations, which in general develop in a more detailed way the material scope of most of the provisions of the revised Charter;
- to improve the functioning of the reporting system in order to make it more efficient, which could imply not to report and, likewise, not to assess in a systematic way all national situations in relation to all provisions of the Charter, but to select the most controversial issues at European and State levels (including the particular situations of States with repetitive conclusions of non-conformity) by means of a kind of a "selective filter" with the collaboration of the Governmental Committee and civil society organisations;
- to keep indivisibility of guarantees together with indivisibility of rights, which implies the compulsory acceptance of the collective complaints procedure. We may recall that the mechanism of individual applications before the Court was also optional in the beginning, but then, logically, it became mandatory. Furthermore, States which have not accepted the procedure are nonetheless affected by the decisions of the Committee in complaints, since the Committee's case law elaborated in the context of this procedure is subsequently applied in the context of the reporting system, and thus binds all States Parties to the Charter.

B. On the other hand, how to improve the implementation of the Social Charter from an external perspective in order to reduce or prevent potential contradictions between the different European levels of protection of social rights, that is to say:

- To emphasize the complementary character of the European Convention and the Social Charter and, in parallel, the complementary action of the European Court of Human Rights and the Committee.
  From a substantial point of view, apart from the common explicit provisions in both treaties (right to organise -Art. 11 of the Convention and Art. 5 of the Charter- or prohibition of forced labour -Art. 4 of the Convention and Art. 2 of the Charter), the European Court has developed through its case law (on the basis of several provisions of the Convention -Arts. 3 or 8- and its Protocols -Art. 1 of Protocol 1-) some issues common to the Charter, such as social pensions, family life, fight against gender and domestic violence or environmental protection.
  From a procedural point of view, the absence of institutional mechanisms to harmonize the solutions adopted by the Court and the Committee, leads to an invitation of positive judicial dialogue aiming at avoiding contradictions and keeping the most favourable solution (*favor libertatis* principle), according to the spirit of Articles 53 of the Convention and 32 of the Charter (Art. H of the revised Charter).
  In this regard, we must put the accent in the preventive function of the collective complaints mechanism, as the “collective” or “general” decisions adopted by the Committee provide the possibility of avoiding the emergence or the continuation of internal conflicts (before the national courts -since the rule of the exhaustion of domestic remedies does not apply to the collective complaints procedure) as well as of avoiding individual applications before the European Court (this way the workload of the Court might be diminished).
- To highlight the mutual normative influence of EU Law and the Social Charter and, in parallel, the potential interaction of the Court of Justice and the Committee.
  From a substantial point of view, some EU Directives were taken into account to draft the 1996 revised Social Charter (e.g., Art. 25 on protection of workers in the event of insolvency of their employer) and, in turn, the 1996 Social Charter has strongly determined the catalogue of social rights of the Charter of Fundamental Rights of the European Union. Apart from this, several controversial issues which are approached by the Court of Luxembourg and the Committee (certain aspects concerning the organization of working time -remuneration for overtime work, on-call duties, etc.- as well as conciliation between economic freedoms and social rights -collective bargaining, etc.-) require harmonized judicial solutions in order to keep credibility in building a *Social Europe*.
  From a procedural point of view, the absence of institutional mechanisms to harmonize the solutions adopted by the Court of Justice and the Committee (the accession of the EU to the Social Charter would be a positive step, *mutatis mutandis* in comparison with the accession of the EU to the European Convention on Human Rights as foreseen by the Lisbon Treaty), leads likewise to encourage a positive judicial dialogue aiming at avoiding contradictions and keeping the most favourable solution, according to the spirit of Articles 53 of the Charter of Fundamental Rights and 32 of the Charter (Art. H of the revised Charter).

IV. Concluding remarks: necessity of European synergies in the context of the economic and financial crisis

The European Social Charter is the pan-European social rights treaty par excellence. The Charter is the instrument of the Council of Europe that best illustrates the indivisibility of all human rights and it has proved successful in overcoming two different visions of the world, thus leading to a truly social Europe, including eastern and western European countries alike.

The best way to celebrate the 50th anniversary of the Social Charter is not to make a nostalgic assessment of the social *acquis* which has been achieved, but to strive for the consolidation of this social *acquis* and its future developments. From this perspective, one of the two biggest challenges to the consolidation of the Social Charter and, consequently to the reinforcement of a social Europe, is the acceptance of the collective complaints mechanism established by the 1995 Additional Protocol. It is commonly held that rights have the same value as guarantees. In this sense, together with the reporting procedure, the collective complaints procedure is the one that best represents the visibility and the success of the European Social Charter. Croatia is one of the 14 countries having accepted this mechanism and, consequently, is a good example of your commitment with European social standards: in the two complaints formulated against your country (nº 45 and nº 52) the reaction of the Croatian authorities has been positive in order to immediately execute or to announce concrete measures for the execution of the Committees' decisions. The bad student is not the one who attends the classes (acceptance of the collective complaints mechanism) and makes efforts to improve his/her situation, but the one who does not make any effort to attend the classes and refuses to be submitted to assessment (non-acceptance of this mechanism).

In parallel, the other major challenge would be to simply replace the 1961 Charter by the 1996 Revised Charter. Incidentally, we should not forget that the year 2011 marks the 15th anniversary of the 1996 Revised Charter. In this case, I think that the ratification of the Revised Charter by Croatia would be a sign of consistency with its accession to the European Union, in so far as the membership of the Union implies the acceptance of the Charter of Fundamental Rights, which has incorporated most of the social rights set forth in the Revised Charter.

Furthermore, the acceptance of the Revised Charter is not only a sign of European consistency, but also of national and constitutional consistency. Indeed, the development of the Revised Social Charter is not an external event. The Charter is not merely an instrument from Strasbourg, from Europe. The 1961 Charter is part of Croatian law as a major domestic legal source (as laid down in Art. 140 of the current Croatian Constitution). But the Revised Charter is most adapted to the Croatian constitutional commitment in favour of social rights: according to your Constitution, Croatia is a "democratic and social state" (Art. 1-1), and a broad catalogue of social, economic and cultural rights is set forth. Indeed, the overview of the application of the Social Charter in Croatia shows examples of progress achieved in the implementation of social rights under the Charter and, consequently, under the Croatian Constitution.

The best way to convey hope to future generations, especially in this period of global economic and financial crisis, lies in achieving the realization of their

social rights as a genuine priority, both from a European and a Constitutional commitment. Civil and political rights also represent a high cost: for example, in the case of organizing elections in order to satisfy voting rights, it is obvious that nobody would consider lowering the standards of political democracy, yet it would certainly be possible to reduce the amount of money spent on electoral campaigns. Similarly, we cannot reduce the level of social democracy.

The 50th anniversary of the Social Charter and the 15th anniversary of the Revised Social Charter must be the occasion to renew with fresh impetus our commitment in favour of social rights. The economic and financial crisis cannot be an excuse to reduce the standards already achieved, but a pretext to progressively strengthen these standards.

Croatia is Europe. While the final supervision of the Charter falls under the jurisdiction of the European Committee of Social Rights, the effectiveness of the social rights enshrined in the Charter depends primarily on the action and commitment of Croatian authorities and civil society actors.

I hope our conference today and celebration is a clear sign of continuation of these positive steps taken by Croatia in relation to the European Social Charter. The consolidation of our Europe of social rights through the Charter is a common task in which we all have responsibilities, the European Committee of Social Rights and the other bodies of the Council of Europe, but also the national actors (public authorities, social partners and civil society organizations, universities and media). The recent Declaration of 12 October 2011 of the Committee of Ministers of the Council of Europe on the 50th anniversary of the Charter put the accent on the promotional role of all these actors.

Therefore, once again I express my gratitude to all of you (organizers of this Conference, especially Pragma, as well as Croatian authorities and all participants) for your strong commitment to the promotion and effectiveness of the Social Charter as the most emblematic pan-European treaty of social rights aiming to improve the daily lives of millions of citizens in Croatia and in the whole of Europe. Thank you very much.