Strengths and weaknesses of the European social charter: increasing the effectiveness of the protection of social rights

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Abstract.
Despite the general development of the states of the European continent and the provision of modern benefits of civilization to the majority of the population, socio-economic inequality continues to grow between countries and within developing countries, which negatively affects individuals and communities, as well as general economic development, social justice and functioning society. The COVID-19 pandemic has added urgency to the need for change. It revealed the strengths and sometimes serious weaknesses of the social rights protection systems in Europe. The pandemic has highlighted the need to strengthen the provision of economic and social rights and their effective protection as part of the overall system of collective guarantees for the protection of human rights in Europe. The ongoing economic recession will cause additional pressure on the scarcity of resources not only for the realization of social rights, but also to prevent their rollback, and Ukraine is no exception.

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For quite a long time, social rights remained a kind of *terra incognita* in international law: until the beginning of the 20th century, they were considered an exclusively domestic sphere, while at the interstate level only provisions regarding political issues were decided and established. The so-called "civilized nations" considered themselves as such by virtue of the very fact that their internal regulations, for example, prohibited slavery, while at the same time considering the conditions of other (mostly non-European) states as "inferior" or "savage" - sometimes, it shall be admitted, this criticism was quite fair because of the tolerant attitude towards slavery or religious or racial discrimination.

However, the latter was often a common cause even in the states of the Western world: often non-Christians could not count on equal, non-discriminatory access to certain positions or had to refuse certain private businesses or settle in strictly regulated areas. Jews suffered extremely from this, the Holocaust (Shoah) became the apotheosis of their oppression. The National Socialist regime – characteristically – approached the physical extermination of the Jews gradually, starting with a significant restriction of their social rights. They were denied access to the entire national system of health care, insurance, and old age pensions; the choice of employment was also limited to those managed by Jews[1]. During the World War Two, Jewish women and children - representatives of the most vulnerable sections of the population - did not have access to food and medicine on an equal basis with representatives of the so-called "Aryan" nationalities.

It is quite obvious that with the end of the war, European states (including de-Nazified Germany) faced the task of firmly enshrining at the international legal level a list of basic, basic standards of human rights by developing normative legal acts that would detail and deepen the provisions of the Universal Declaration of Human Rights applicable to the European region.

Such a document was the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950[2], which not only established certain rights and freedoms as inalienable
to every "European citizen", but also established a practical mechanism for their protection through a body that in the modern world bears the name of "European Court of Human Rights" (ECHR). As Guido Raimondi, head of the body in 2015–2019, aptly noted: "The European human rights protection system with its Court would be unimaginable if it were separated from democracy. In fact, we have a connection that is not exclusively regional or geographical: a state cannot be a party to the European Convention on Human Rights unless it is a member of the Council of Europe; it cannot be a member state of the Council of Europe if it does not respect pluralistic democracy, the rule of law and human rights. Therefore, a non-democratic state cannot participate in the ECHR system: the protection of democracy goes hand in hand with the protection of rights."[3]

At the same time, the rapid post-war development of industry and, as a result, the increase in the number of workers inevitably gave rise to a demand for the recognition of the rights and freedoms associated with this sphere of social life. In contrast to the USA, where the field of labor relations has always been and remains nowadays largely decentralized (or, at most, within the competence of individual states), the dominance of Christian and social democrats in the political arena of post-war Europe objectively contributed to the request for state intervention in the field of social rights. The policy of distributism, characteristic of the first ones, derived, as it is believed, at the end of the 19th century, deserves attention here. in the encyclicals of Pope Leo XIII. Under such a system, most people could ideally make a living without relying on the use of the property of others – such as farmers owning their land and stock, carpenters and plumbers owning their tools, and so on. At the same time, the means of production should neither be acquired, as socialism predicts, nor concentrated in the hands of a number of corporations.

Such considerations led to the appearance of the European Social Charter in 1961, or the European Social Charter[4]. The "initial" ESC was opened for signature on October 18, 1961. In the late 1980s and early 1990s, the political and legal process of modernizing the Charter began. In 1988, the
first Additional Protocol was concluded, which added a number of new rights. The 1991 Amending Protocol improved the enforcement mechanism, and the subsequent 1995 Additional Protocol provided for a system of collective complaints. The culmination of the process of reforming the act was the presentation in 1996 of the so-called “revised” ESC, which preserved the main content of the 1961 Charter and protocols thereof.

On October 7, 2021, the Committee of Ministers established a special working group on improving the EUH system (GT-CHARTE); its consolidated report summarizing its proposals was approved at the meeting of the Committee of Ministers in Turin in May 2022. These proposals envisage, in particular, increased monitoring of the implementation of conclusions and a stronger operational response to violations of the ESC[5].

In particular, the project puts forward proposals to encourage participating states to submit special reports in the event of "new or critical problems of a significant scale or pan-European dimension". Further measures should include dialogue between participating states, involvement of relevant stakeholders (including social partners and civil society).

42 of the 46 member states of the Council of Europe (CoE) have ratified either the 1961 Charter or the revised Charter. Liechtenstein, Monaco, San Marino and Switzerland have only signed the document. The revised ESC consists of 6 sections and articles marked with Latin letters from A to O. They are preceded by part 1, in which there are 31 articles with number markings, where the basic social rights belonging to individuals are set forth. Each state that ratifies the instrument pledges to consider part 1 as a declaration of the objectives it will seek to achieve, as well as at least 6 of articles 1, 5, 6, 7, 12, 13, 16, 19 and 20 as mandatory. Also, the state must consider as binding for itself such additional number of articles or numbered clauses of Part II of the Charter as it may determine, provided that the total number of articles or numbered clauses that it considers binding on itself is not less than 16 articles or 63 items marked with numbers.

The 1995 Additional Protocol also belongs to the ESC. It
defines the procedure for submitting complaints by non-governmental organizations, employers' organizations and trade unions regarding non-compliance with the document. Complaints are reviewed by the Social Rights Committee and, based on the results of such review, issues decisions that are sent to the Committee of Ministers for consideration.

To the extent that they refer to binding legal provisions and are adopted by a supervisory body established by the Charter, the Conclusions of the Committee of Social Rights must be respected by the States concerned; however, they are not, *stricto sensu*, enforceable in national legal systems. In practice, this means that, when the Committee takes a stand that the situation in a state is not in compliance with the Charter, that state cannot be forced to implement the Committee's findings into national law. Since the decisions made by the European Committee of Social Rights within the framework of the collective complaints procedure, the Conclusions made within the framework of the reporting system are declaratory; in other words, they lay down the legal provisions. Based on this, domestic authorities have an obligation to take measures for their implementation in the way compatible with the national legislation. In this regard, domestic courts may (but not obligatory, yet this is most often a case as the international law usually prevails) invalidate or annul inner legislation if the Committee determines that it is not in accordance with the Charter.

In principle, the rights recognized by the ESC apply to all workers in the economy of the participating state, regardless of the sector (for example, the public and private sectors) and the form of employment (salaried or self-employed, home workers, etc.). The Annex to the ESC, which delineates the personal scope of the Charter, generally limits the application ratione personae to citizens of other states who legally reside or regularly work in the territory of the respective state.

Thus, foreign citizens must satisfy the three conditions for obtaining the rights provided for by the ESC, on the same grounds as citizens. They should be:
- citizens of one of the member states;
- persons with the right of entry and residence on the
of a member state; and/or
- regular workers, which means permission to enter and work in the state.

Thus, the ESC by itself does not generally grant foreign citizens the right of entry or freedom of movement on the territory of other member states. However, in accordance with the wording of the Charter and the Committee's case law, member states are obliged to implement a flexible immigration policy towards citizens of other member states by liberalizing the rules for hiring foreign workers and promoting family reunification. An Annex expressly mentions refugees and stateless persons who, if legally resident in the territory of a State Party, shall be accorded treatment as favorable as possible and in any case no less favorable than in accordance with the obligations entered into under the said instrument and in accordance with any other existing international instruments applicable to these groups of persons.

One of the problems of the document is that a number of its provisions somewhat overlap and overlap. For example, Art. 2 (4) on the elimination of risks in dangerous works essentially coincides with Art. 3 on the right to safe and healthy working conditions; Art. 16 on the right of the family to social, legal and economic protection, provides (however, in the Committee's precedent work) the right to shelter and housing for families, which is also included in the right to housing (Article 31); Art. 4 (3) on equal remuneration for work of equal value for women and men and Art. 20 on gender equality in employment; likewise, Article 23 coincides with other provisions of the Charter that protect the elderly as members of the general population, such as Art. 11 (right to health care), and 13 (right to social and medical assistance). It is believed, however, that this is a kind of safeguard - in case the state has not ratified certain provisions of the ESC.

Another problem, which is often a case, is the risk of divergence in the EU member states' obligations under the ESC and the Charter of Fundamental Rights of the EU, which also contains provisions for the protection of those who work. The rights and freedoms listed in the European Convention on Human Rights were de facto incorporated as part of the general
principles of EU law and taken into account when developing the draft Charter of Fundamental Rights of the EU. Therefore, the European Court of Human Rights has repeatedly expressed its confidence in the fact that the EU guarantees a level of protection of fundamental rights equivalent to the European Convention on Human Rights. In Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland (2005), the European Court of Human Rights established a presumption that any measure taken by an EU Member State to fulfill its obligations under EU law and under the supervision of the Court of Justice of the European Union, is compatible with the requirements of the Council of Europe, unless there is an obvious "manifest disadvantage" of such a measure.

At the same time, 2009 revealed a rather significant problem of the ratio of the obligations of the states under the EUS and within the framework of the Eurozone. At that time, the governments of the states, which set themselves the goal of achieving the recovery of the Greek economy, set before its government the requirement to take measures for the so-called "financial recovery", which included levers of influence on the labor market - and not all bodies reacted to this unambiguously.

Despite the fact that various human rights bodies have expressed concerns about the consequences of the austerity measures adopted within the framework of these programs, the strongest condemnation came precisely from the Committee of Social Rights. The first wave of fiscal consolidation measures adopted after the signing of the Memorandum of Understanding between Greece and its creditors in 2010 resulted in seven decisions by the Committee.

At the same time, it can be concluded that, despite certain problems in the relationship of the ECHR with the norms of EU law, the bodies of the European Union and the Council of Europe are in most cases able to find a mutually satisfactory solution.

Even taking into account certain flaws of the document, it is difficult to question the significance of the EUS. It became the first document of its kind - the guardian of human rights in the social sphere, and laid the foundation for the subsequent creation of a system of protection of such rights
in the EU almost from scratch. And even if the criticism of ensuring the implementation of the decisions of the Committee of Social Rights can be justified - it is unlikely that international law, taking into account the generally dispositive way of its regulation, would be able to offer some more satisfactory means, which, on the one hand, would prove itself effective for the restoration of violated rights, and on the other on the other hand, would not intrude too much on the competence of national bodies and would not deprive the state of the opportunity to actively develop its means of responding to the injustice found. It remains to be hoped that, in this regard, the GT-CHARTE report approved in Turin will be properly assessed and implemented by the member states of the Council of Europe, which are parties to the instrument.

**References:**


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