



Strasbourg, 23 September 2004
CCS 2004/07

Restricted
CDL-JU(2004)055
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**in co-operation with the
THE CONSTITUTIONAL COURT OF BELARUS**

International Scientific and Practical Conference

*“Constitutional control and development of a social state
ruled by law”*

Minsk, 9 - 10 September 2004

**SOCIAL RIGHTS IN THE PERSPECTIVE
OF INTERNATIONAL LAW**

Report

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For the last half century political and legal doctrine on *social rights* has been very much influenced by political ideology. The promotion of *social rights* – as distinguished from *civil and political rights* – has often been characterised as a project of the political left. And that has made unbiased debate of legal aspects of social rights a sometimes difficult task. 15 years ago the global political picture started to change decisively, and the political consequences have been far reaching in the European region.

But what has happened in the sphere of international law, especially in Europe? How was, how is legal development influenced by political change? What is the legal position of social rights in Europe today?

Sensible lawyers have pointed out many times that the development of socio-economic rights has been one great contribution of the 20th century to human rights and humanitarian law. And of course they are right. Their best example is the Universal Declaration of Human Rights, всеобщая декларация прав человека. This Declaration was adopted within the emerging framework of the United Nations by resolution of the General Assembly¹ in December 1948 after only two years of deliberations. The Declaration proclaimed not only traditional civil and political rights – as other declarations had done before – but it included in its catalogue of rights also social rights as for example the right to work in Article 23. This was achieved by negotiations which at times were difficult. But these negotiations were not burdened by the kind of political controversy between right and left of the political spectrum which later restrained legal development. Therefore the Universal Declaration of 1948 was “universal” even in this respect.

The Universal Declaration of 1948 became the obvious point of departure for further work on an international bill of human rights which was to include a Covenant on Human Rights.² But the political atmosphere had changed. It took until 1966 – 18 years – before two more human rights instruments were added to the Universal Declaration and adopted as international treaties:

- the International Covenant on Civil and Political Rights, международный пакт о гражданских и политических правах, and
- the International Covenant on Economic, Social and Cultural Rights, международный пакт об экономических, социальных и культурных правах.

And it took ten more years, until 1976, before these treaties entered into force.

It is significant and important to note that not *one*, but *two* Covenants were the final results of this work. The essential components of a comprehensive universal bill of rights – provisions on the one hand on *civil and political rights* and on the other on *social rights* – were again dealt with separately and distinctly differently in many ways. And in principle, that has not changed since 1966.

However, there is now quite a number of supplementary treaties in the field of human rights and international humanitarian law. The result has been overlapping provisions. And therefore the two Covenants, which originally had been conceived as separate instruments, cannot any longer be applied and interpreted without regard to each other and to the many other instruments of international law on related topics – if that ever was possible in the perspective of lawyers.³

¹ Resolution 217 A (III) of 10 December 1948.

² Part F of Resolution 217 A (III) of 10 December 1948.

³ Cf. the resolutions of the General Assembly of the United Nations A/Res/40/114 of 13 December 1985 and A/Res/41/117 of 4 December 1986 (Indivisibility and interdependence of economic, social, cultural, civil and political rights).

In the European region the first basic post-war human rights document was drafted and in 1950 adopted by the Council of Europe,
– the European Convention for the Protection of Human Rights and Fundamental Freedoms, конвенция о защите прав человека и основных свобод.

In its preamble this Convention refers to the Universal Declaration of 1948. But unlike the Universal Declaration the Convention was focused on civil and political rights, only one of the two components of the Universal Declaration. The other component – provisions on social rights – was *not* included. Obviously much had happened during the two years since the adoption of the Universal Declaration by the General Assembly of the United Nations; reluctance to guarantee social rights on the same legal level as civil and political rights prevailed.

What had changed was the general political climate and with that the perspective in which human rights were perceived. Right after the adoption of the Universal Declaration the phase of the Cold War had started when the two dominant ideologies were confronting each other hotly, and that had consequences for the perception of guarantees for social rights.

During those years of the Cold War a pattern could be observed again and again. Very simplified it can be described so:

- Western states wanted to strengthen protection of human rights mainly by guaranteeing civil rights and political freedoms; social rights could be promoted as auxiliary only and as binding solely upon states.
- Eastern states wanted to strengthen economic, cultural and social rights; provisions on civil rights and political freedoms were binding upon states, and states only. States therefore could and should decide how such provisions had to be interpreted and implemented.

In this climate of ideological struggle the European Social Charter, Европейская социальная хартия,⁴ was drafted for Western Europe. That was done within the framework of the Council of Europe. The draft was conceived as a complement to the Convention of 1950 to be open to the member states of the Council.

This Charter was adopted in 1961 – five years before the United Nations Covenants – and entered into force in 1965 – one year before the Covenants.

I will not describe the contents of the Charter. That is not possible here. Let me only recall that the Charter

- guarantees a considerable number of social rights, among which the states could choose and pick, and that the Charter
- provides for an elaborate reporting system concerning application of Charter provisions, which states had accepted.

But let me also mention two small and not so well known bits of information, which clarify the *context* in which the Charter was adopted and which have to be taken into account when provisions of the Charter have to be interpreted.

Firstly: In the Preamble to the Charter a reference was made to the European Convention on Human Rights of 1950. This reference clarifies that the aims of the Charter are complementary to the aim of the Convention to secure civil and political rights.

⁴ ETS 35.

Secondly: In Article 26 of the Charter, the International Labour Organisation was invited to participate in a consultative capacity in the examination of submitted state reports. This invitation clarifies that there is an important link between the human rights work of the Council of Europe on the one hand and on the other the work of the International Labour Organisation on standards, fundamental principles and rights at work.⁵

Through these and other, similar, provisions a far larger picture became visible: The Charter presented itself as part of a large web of international law instruments. This has to be recognised and the Charter has to be interpreted accordingly.

This image of social rights protection as it had developed in the mid-1960ies did not appear to change much for more than a decade.

At the global level there was the International Covenant on Economic, Social and Cultural Rights to be taken into account, and at the regional level in Western Europe the Social Charter. The ideological positions were entrenched; progress, if any, was slow and not readily visible. Other obstacles were far reaching confidentiality and a corresponding lack of transparency and the obligation for the implementing bodies of the United Nations and the Council of Europe to seek cooperation of state parties in almost all implementation proceedings.

However, the notion that social rights should be guaranteed within the framework of international human rights law had taken root. It was firmly established and it was developing step by step.⁶

As time went by, traditional political reluctance and established legal restrictions were softened, and tentative new initiatives were taken – regionally in Europe during the second half of the 1980ies. They set in motion a general overhaul of the European treaty system concerning social rights, which started in the last part of the 1980ies and is still not finished.

This overhaul took and takes place within two different but related settings.

The first project developed within the *Council of Europe* and concerned the revision of the European Social Charter of 1961.

Within the framework of the Council of Europe, the Charter of 1961 was amended by three protocols:

⁵ As it is described in the heading of the website at <http://www.ilo.org/public/english/standards/index.htm>.

⁶ Cf. – among many other documents of the United Nations – the resolutions of the General Assembly of the United Nations A/Res/40/114 of 13 December 1985 (Indivisibility and interdependence of economic, social, cultural, civil and political rights), A/Res/40/115 of 13 December 1985 (International Covenants on Human Rights), A/Res/40/116 of 13 December 1985 (Reporting obligations of States parties to United Nations conventions on human rights), A/Res/41/32 of 3 November 1986 (Twentieth anniversary of the adoption of the International Covenants on Human Rights), A/Res/41/117 of 4 December 1986 (Indivisibility and interdependence of economic, social, cultural, civil and political rights), A/Res/41/119 of 4 December 1986 (International Covenants on Human Rights), A/Res/41/120 of 4 December 1986 (Setting international standards in the field of human rights), A/Res/56/144 of 19 December 2001 (International Covenants on Human Rights) and A/Res/58/165 of 22 December 2003 (International Covenants on Human Rights). Cf. also the Resolution of the Economic and Social Council 1985/17 of 28 May 1985 (Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights). All documents accessible at <http://www.un.org/Depts/dhl/resguide/quick.htm>. – Cf. also the latest report on State Parties to the International Covenant on Economic, Social and Cultural Rights and the status of submission of reports in Economic and Social Council document E/C.12/2004/7 of 24 June 2004, at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/554d5a870504a739c1256ed800529e98?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/554d5a870504a739c1256ed800529e98?Opendocument).

- in 1988 by the Additional Protocol, дополнительный протокол, which was aimed at extending the rights guaranteed by the charter⁷;
- in 1991 by the Amending Protocol, протокол о внесении изменений, which improved the control machinery of the Charter⁸; and
- in 1995 by the Amending Protocol, which introduced provisions for a system of collective complaints, дополнительный протокол, вводящий систему коллективных жалоб.⁹

Finally, in 1996 a revised version of the Charter was adopted, and it entered into force on 1 July 1999.¹⁰

This new version of the Charter replaced the Charter of 1961 and its Additional Protocol of 1988. To the catalogue of rights were added new rights, as for example

– the right to protection in cases of termination of employment, право на защиту при окончании найма, in Article 24,

– the right to protection against poverty and social exclusion, право на защиту от нищеты и социального отторжения, in Article 30,

and

– the right to housing, право на жилье, in Article 31.

But the recently restructured system of enforcement and control as regulated in the protocols of 1991 and 1995 remained unchanged.

The second project started within the then *European Community* in 1999 and is continued by the *European Union* today. For many years an unanswered question had been, whether the Community could and should become a Party to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. The substantial law of the Convention had been part of Community law for many years as general principles of law, but in 1996 the Court of the European Communities had declared that outright accession by the European Union to the Convention was not possible under the existing treaties¹¹. This was legally entirely correct, but put the European Union in a somewhat embarrassing position.

The escape route, which finally was chosen at the European Union summit in June 1999¹², was to develop a human rights document of the European Union. This was seen as beneficial in other ways, too. The Convention of 1950 had been amended by protocols, but the text was nevertheless outmoded and had to be interpreted with the huge body of decisions of the European Court of Human Rights in mind. A Community Charter could consolidate all this and could even add relevant *acquis communautaire*.

The mandate to carry out this was given to a Convention of representatives of the member states of the European Union under the presidency of the former German president Herzog. The proposals of the Herzog-Convention were accepted and solemnly proclaimed at the summit in Nice in December 2000 as *Charter of Fundamental Rights of the European Union*.¹³ But this Charter became not yet a legally binding document. The decision on the legal status of this Charter was postponed in Nice. Further discussions followed within a second Convention of representatives of the member states, which under the presidency of the

⁷ ETS 128.

⁸ ETS 142.

⁹ ETS 158.

¹⁰ ETS 163.

¹¹ Opinion 2/94, 1996 ECR I-1759.

¹² Bulletin EU 6-1999, Conclusions of the Presidency (I.18.44 and 45) and Annex 4: European Council decision on the drawing up of a Charter of fundamental rights of the European Union (I.64).

¹³ OJ 2000 C 364/1.

former French president Giscard d'Estaing had to draft a Constitutional Treaty for the European Union. This draft incorporates the Charter as part II of the Treaty, and it remains to see, if and when it will be ratified and enter into force.

Chapter IV of the Charter – on *Solidarity* – provides for social rights in eleven Articles, for example

- on worker's right to information and consultation within the undertaking in Article 27,
- on protection in the event of unjustified dismissal in Article 30
- on health care in Article 35 and
- on consumer protection in Article 38.

The interdependence of these provisions in the European Union Charter on the one hand and the Social Charters of the Council of Europe on the other and the similarities of the Charters of both organisations are obvious and intentional, because the European Union Charter was intended to consolidate fundamental rights applicable at Union level and among those the economic and social rights as contained in the European Social Charter.¹⁴ For example the just mentioned provision in Article 27 of the European Union Charter is very similar to its counterpart in Article 21 of the Revised Social Charter of the Council of Europe.

This consolidation of political and civil rights with social rights was not achieved easily. Quite astonishingly, the ideologically inspired and very divisive question of the 1950ies and 1960ies whether or not to put provisions on social rights into human rights instruments was again put forward during the deliberations of the Herzog-Convention, and the ensuing controversy came close to wrecking the whole Convention process.¹⁵ The political arguments of a dark past were initially still valid for many Convention members!

So, the European Union law on social rights is still in the making. Let me therefore leave it at that.

I want to conclude with some words on reporting and control procedures concerning social rights. The latest – and most interesting – development has been the setup and refinement of procedures for state reporting and for collective complaints by the Amending Protocols to the European Social Charter of 1991 and 1995.

Both systems seem to be successful.

The requirements which have to be met by state reports are thorough and far reaching. Reports have to be delivered at certain intervals and have to cover the implementation of the articles of the Social Charter according to a fixed schedule. The first report has to cover the implementation of the nine “hard core” provisions of the Charter as for example those in

- Article 1 on the right to work, право на труд,
- Article 5 on the right to organise, право на организацию,
- Article 12 on the right to social security, право на социальное обеспечение, and
- Article 16 on the right of the family to social, legal and economic protection, право семьи на социальную, правовую и экономическую защиту.¹⁶

¹⁴ Bulletin EU 6-1999, Annex 4 (I.64), para 2.

¹⁵ See E. Riedel in: Jürgen Meyer (ed.): Kommentar zur Charta der Grundrechte der Europäischen Union, Baden-Baden 2003, p. 325–330.

¹⁶ The other “hard core” provisions are Article 6 – The right to bargain collectively (право на заключение коллективных договоров), Article 7 – The right of children and young persons to protection (право детей и молодежи на защиту), Article 13 – The right to social and medical assistance (право на социальную и медицинскую помощь), Article 19 – The right of migrant workers and their families to protection and assistance (право трудящихся - мигрантов и их семей на защиту и

Guidance concerning the contents of these reports is given in a questionnaire, which was adopted by the Committee of Ministers of the Council of Europe in 2001. This questionnaire is published on the Internet.¹⁷ On altogether 91 pages hundreds of questions are put forward. For example concerning the right to work in Article 1 of the Revised Charter there are 21 questions asked. Very few of them could reasonably be answered in one sentence only; many require to dig deeply into statistics and into political statements and legal instruments. A proper reply to the whole questionnaire will draw up a very detailed picture of the social rights situation in the reporting state, and the state will have to give an abundance of information even on very technical aspects of the implementation of social rights guarantees. But to write a proper report places a heavy burden on the authority which has to prepare the report. The first French report under the Revised Charter was a lengthy document of 142 pages.¹⁸ And this first report dealt only with the “hard core” articles of the Charter!

Reports, however, may be incomplete. The bright side of the picture may be reported broadly, while information on not so bright aspects may be given with less detail or, maybe, omitted. To minimise ambiguity and incompleteness of this kind and in order to hear more than one voice every state report has to be communicated with certain non-governmental organisations. This requirement assures that presentations of the state of social rights in a country will be reasonable and fair. Publication of the state reports on the internet site of the Council of Europe¹⁹ adds transparency.

Finally, there is the instrument of collective complaints under the Amending Protocol of 1995. This Protocol entered into force in 1998, and it is still too early for an evaluation. Only 13 decisions on the merits of the European Committee of Social Rights are as of early September 2004 reported on the internet site of the Council of Europe.²⁰ But they are promising much for the future. They have already added a wealth of verifiable and useful information on the implementation of social rights guarantees in general and the substance of political and legal arguments *pro* and *contra* implementation in particular. The European Convention on Human Rights of 1950 could never have been a success without the enormous wealth of decisions which have been delivered by the Commission and the Court of Human Rights in Strasbourg. In my view the European Social Charter has a similar chance to become a success, if and when complaints – whether collective or individual – and ensuing decisions can add blood and flesh to the usually anaemic reasoning in articles of the Charter and in state reports.

Minsk, 9 September 2004

помощь) and Article 20 – The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (право на равные возможности и равное обращение в занятости и выборе рода занятий без дискриминации по признаку пола); see Part II Article A.1.b of the Revised Social Charter.

¹⁷ Form for the reports to be submitted in pursuance of the revised European Social Charter. Adopted by the Committee of Ministers on 17 January 2001; downloadable at http://www.coe.int/T/E/Human_Rights/Esc/4_Reporting_procedure/1_State_Reports/Form_download.asp#TopOfPage.

¹⁸ Downloadable at http://www.coe.int/T/E/Human_Rights/Esc/4_Reporting_procedure/1_State_Reports/Revised_Social_Charter/2002/cycle_2002.asp#TopOfPage.

¹⁹ At http://www.coe.int/T/E/Human_Rights/Esc/4_Reporting_procedure/Index.asp#TopOfPage.

²⁰ http://www.coe.int/T/E/Human%5FRights/Esc/5%5FCollective%5Fcomplaints/List_of_collective_complaints/01List_%20of_complaints.asp#TopOfPage.