Write up of the remarks made at the opening of the colloquy "European Social Charter, an Instrument of the Future!"

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I welcome this event and congratulate the organisers and Strasbourg University for it. I can only applaud every occasion when legal professionals and scholars—and future legal professionals—discuss social rights and the European Social Charter.[1] I am particularly pleased to be here because the Council of Europe in general and, more specifically, the Department of the European Social Charter and the European Committee of Social Rights, have a longstanding love relation with academia. At present, when think-tanks are so fashionable, academia seems to be somewhat forgotten. But academia and universities are the most formidable think-tank that there is and there has ever been. It has been around for a long time. Academia is an engine of progress, it provides ideas and advances creative solutions, it is frequently a resource for us in the Council of Europe from which to draw expertise. There is a permanent symbiosis between the Council of Europe and universities.

What better place for a sequel to yesterday's Expert Seminar held at the Council of Europe on 'reinforcing social rights protection in Europe: to achieve greater unity and equality'. That event was organised within the framework of activities of the ongoing French Presidency of the Committee of Ministers of the Council of Europe. The French Presidency also supported wholeheartedly the organisation and celebration of this colloquy, and was very supportive that the Council of Europe's seminar should be organised together with or, as it was, in liaison with Strasbourg University.

Let me introduce the subject and open the colloquy with some scattered reflections and thoughts. I will not focus [only] on the European Social Charter. Many of you have been specialising on the Charter and have worked on it for many years, much more than I have, and I have nothing to teach you about the Charter. In addition, many of you contributed or attended and actively participated in yesterday's Expert Seminar at the Council of Europe, so there is no point in attempting to repeat or summarise what was discussed there.

Two years ago, in November 2017, the Committee of Ministers of the Council of Europe gave terms of reference to the Steering Committee on Human Rights—known as the CDDH—to provide an 'analysis of the legal framework of the Council of Europe for the protection of social rights in Europe, identify good practices and make, as appropriate, proposals with a view to improving the implementation of social rights'. I would underline that the mandate involved 'proposals with a view to *improving the implementation of social*

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[1] 1961, ETS 35.

rights'. The work was done by a CDDH drafting group on social rights, the CDDH-SOC, whose chairperson is here with us today, Mr Vít Schorm.

But, is there real appetite for change, or for radical change in the existing paradigms? The mandate given by the Committee of Ministers to make 'proposals with a view to improving the implementation of social rights' suggests that there is. But the two excellent reports produced by CDDH-SOC in response to that mandate put on record Member States' concerns about legal certainty, predictability and the personal scope in the application of the European Social Charter, as if looking for arguments for restraint rather than opportunities for advancement. In a way, the focus is on the 'what' or even the 'how', when we should perhaps be focusing on 'WHY'.

It is clear that there is unease about the way the European Social Charter is applied, unease among Member States that was expressed during CDDH-SOC discussions and in responses to a questionnaire and broad consultation that the drafting group conducted. This is the 'what', the articulation of social rights under the Charter, and the "how", the monitoring of those rights and their construction or exegesis by the European Committee of Social Rights, its decisions in the collective complaints procedure and its conclusions in the framework of monitoring through the reporting procedure.

How about the 'why'? First of all, social rights are human rights. As such, they share the characteristics of universality, indivisibility and interconnectedness of human rights, whether they are civil and political rights or economic, social and cultural rights. More fundamentally still, upholding social rights is the right thing to do, it is about human dignity. Dignity shared by, and owed to, each and every human being. Social rights are referred to in the Council of Europe as human rights in everyday life, or '*droits de l'homme au quotidien*'.

These are rights—such as employment and fair remuneration, safety at work, non-discrimination and equal pay, education and training, housing, healthcare, social security and assistance, unemployment benefits, decent housing and livelihood, participation in the life of the community—that every citizen enjoys daily or, in their absence, suffers in body and soul every instant.

As we heard yesterday, the 'why' is also about social and democratic sustainability. If a social rights shortfall persists in a democracy, people feel let down by those elected to govern. Disenfranchised, people are vulnerable to anti-system and populist rhetoric. Democratic security is thwarted. The sense of vulnerability is magnified if people feel left behind, as many do because of austerity measures, technological change or globalisation. Growing inequality can also render people receptive to hate speech aimed at "the other". Fear mongers drive polarisation even further on the back of ethnic, religious and racial diversity and, sometimes, related violence. And there is migration, a disruptive

phenomenon that is likely to grow exponentially as population flows increase because of the effects of climate-change.

A specific question for academics and practitioners alike, human rights lawyers and international law specialists, could perhaps be about the value—the weight and value—of Part I of the European Social Charter. It cannot just be empty words. Part I stipulates that the 'Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the [rights and principles set out there] may be effectively realised'. Part III, Article A, repeats that 'each of the Parties undertakes … to consider Part I of this Charter as a declaration of the aims which it *will* pursue by all appropriate means.' Emphasis on '*policy to be pursued by all appropriate means*' and a commitment to '*aims that the state* ***will*** *pursue*'. This should be examined against the repeated mantra, reiterated in the preamble to the Charter, about the indivisibility of human rights and the declared objective of 'maintenance and further realisation of human rights and fundamental freedoms'.

What are the implications of the limits imposed by the selective monitoring under the Charter? What are the implications of programmatic *versus* enforceable provisions? What is the meaning or the limits of an '*a la carte*' approach, today, in the area of human rights? Is it acceptable to consider that the Charter allows for opt-out human rights, or is it just about opting out from monitoring?

Article 22 of the 1961 Charter or Part IV, Article C, of the Revised Charter,[2] provides for a reporting process in respect of provisions under Part II of the Charter that have not been accepted by a state at the time of ratification or approval or in a subsequent notification. Is Article 22 a sort of self-imposed non-conformity? How should Article 22—the obligation to periodically report on non-accepted provisions and examination by the European Committee of Social Rights of the degree to which the situation is apt for the country in question to be invited to accept such provisions—be articulated as part of the monitoring procedures under the European Social Charter?

Yesterday, during the Expert Seminar, Professor Petros Stangos, a member and former Vice President of the European Committee of Social Rights, and your rapporteur today, raised the question of monitoring under the Charter as part of a governance framework. This is an important angle that merits being explored further.

Governance strikes me as a quality dimension in decision-making processes, not just about management or a mere question of structures and interactions, or even the accumulation or addition of executive decisions. It is not a formal question of decision-making systems, structures, layers and interactions. Management or executive decision-making—sometimes well-founded but sometimes short-sighted, short-range or short-term—is to be

[2] 1996, ETS 163.

distinguished from *governance*, which encompasses the processes that inspire, the inputs that inform, shape and control the quality of decisions, to make them better, rendering them strategic, providing wide-ranging, long-term holistic solutions. *Good governance* is about decision-makers availing themselves of the best and most complete possible information, so as to be able to take the best possible, well-informed decisions. *Good democratic governance* adds a further dimension: participation. In a democratic society, people who are affected by a decision must be able to participate in the decision-making process.

Against this backdrop, the European Social Charter and the results of the monitoring processes conducted by the European Committee of Social Rights are governance—or good governance—ingredients in decision-making processes in the national domestic sphere. This is true whether this good governance component inspires decisions of policy-makers and legislators, executive authorities or judicial authorities.

Which leads me to another reflection, on the notion of sovereignty. Montesquieu advocated the separation of the powers of the state–executive, legislative and judicial; this is broadly accepted as a pre-condition for democracy. President Lincoln gave us the words that we all adhere to (at least I do), that democracy is the government of the people, for the people, by the people. The so-called 'powers' of the state are thus reduced in a democracy to the exercise of authority by delegation from those who matter in democracy, the people. This has been translated into modern constitutions as the ultimate power (or sovereignty) in a democracy lying with the people. Sovereignty belongs to the people, subject of course to fundamental human rights, democracy and rule of law imperatives. Elected public officials and civil servants of all categories are there to serve the people, and pursue the common interest or public good.

However, the notion of state sovereignty seems stuck to old and outdated ideas. It is perhaps time to redefine sovereignty as the responsibility or the duty to protect the people —true owners of sovereignty—within a state's jurisdiction and the associated obligation to promote and preserve their enjoyment of human rights, moving away from the conception that allows it to be used as a prerogative to harm or to subjugate citizens without interference from other members of the international community, an ill-founded remnant of the old-time rulers' divine right.

The idea of who does sovereignty belong to, who it is there to serve, coupled with human rights—and social rights—imperatives should point to the direction that has to be followed. It is indefensible that sovereignty is used against, and not in the interest of, those to whom it belongs. Social rights are not about affordability. It is no longer possible to take at face value the argument of decision-makers that resources are lacking, when taxation penalises low income households, favours accumulation of wealth and exacerbates inequalities. It is equally unacceptable for regulation to open loopholes and allow for relocation of wealth so that tax evasion reaches, according to reputed investigators, unimaginable levels. Delivery of rights and delivery against international human rights obligations is about

prioritisation, and human rights—including social rights—must come first. Prioritisation that is favourable to the few as opposed to the many, that increases poverty and inequalities, that fails to secure the enjoyment of basic social rights to all members of the community on an equitable basis, is either the result of ignorance or ineptitude if decision-makers should have known but did not know better, which makes them incompetent, or it is the result of knowingly taking a decision that does not serve the interests that ought to be served, which may well be characterised as corruption.

This brings me to the conclusion of my remarks and of my opening statement in the following terms. It may be high time to change the narratives about social rights. The moment may be ripe to re-write the social contract, developing through inclusive multi-stakeholder dialogue—that is, through good democratic governance—a new social contract fit for twenty-first century democracies that respect fully human rights and uphold the rule of law, replacing if necessary the centuries-old social contract assumptions. Even more important, it is necessary to affirm unequivocally the notion of social rights primarily as a matter of rights. Rights cannot be subordinate to policy and services. On the contrary, social policy should be at the service of social rights, and delivery has to be secured through social services. This is about putting the rights —or the 'why'—first, with the 'how' articulating social policy, and 'what' corresponding to the delivery of the services that those policies enable.

I suspect that academia—and university, the most formidable think-tank of all—has a lot to tell us and to teach us about the questions that I have glossed over. Your capacity for creativity, foresight and innovation, your ability to provide critical thinking and point to the direction that might be followed will continue to be, as a form of cross-fertilisation, at the centre of our love relationship.

I look forward to your discussions and to discovering the answer to the question that gives title to this colloquium: '*La Charte sociale européene: un instrument d'avenir?*