The Council of Europe System of Rights – Culturally Progressive Family Life without Robust Social and Economic Protection

Petr Kocina
Univerzita Konštantína Filozofa v Nitre, SR

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The paper examines the Council of Europe's system of rights protection regarding family life and its underlying philosophical modus operandi. The system recently attracted a lot of criticism. When it comes to its progressive family model, visceral attacks come from the political right and conservative circle, while at the same time, system faces criticism from the political left, mainly due to the lack of emphasis on the social and economic rights. The aim of the paper is to examine alleged disbalance between civil and political rights on the one hand, and social and economic rights on the other, when it comes to the family life.

Keywords: Social and economic rights – Family – Human rights – Council of Europe

Introduction

The Council of Europe system of rights protection is facing criticism from various political and philosophical grounds. It has a rather progressive view and definition of family, providing some formal protection to variable family life and diverse family constellations, that puts the system directly in the conservative line of fire. Yet, due to the lack of emphasis on the social and economic rights, system has not got many friends among the political left either. Criticism, therefore, comes from all sides. The Council of Europe system of rights protection thus often finds itself between rock and hard place. The aim of the paper is to examine alleged disbalance between civil and political rights on the one hand, and social and economic rights on the other. The paper shall look at merits of some

of these charges. It is divided into two parts. The first part seeks to outline the historical development and political context that shaped the focus of the legal system from the beginning. A brief analysis of the substance and implementation of the main relevant legal instruments for the protection of rights is situated in the second part, that also provides the core evidence to back up final conclusions.

The Birth of Council of Europe System of Rights Protection

When the horrors of the Second World War ended with pictures of the Nazi death camps on public display, one of the most important political and thus also legal questions of the time was certainly the one of prevention. How could a disaster like that be effectively prevented in future (Greer 2006)? Was the danger simply over with militarily defeated Germany and politically discredited Nazism? No, it was obvious to many diplomats and statesmen at the time, that alongside atrocities perpetrated by Germans, mass deportations, and murders were carried out by the victorious Soviet allies, and particularly disturbing, although officially denied, was the fact that Soviets were still committing crimes on the massive scale in Soviet Gulags and elsewhere (Davis 2006). New threats to fundamental human rights, as observed at the time by western liberal democracies, and to then standard political freedoms reappeared very soon after the War in other forms of totalitarianism (Rainey 2014). It was obvious that the past international legal and constitutional arrangements were not effective in neutralizing ambitions of authoritarian political movements opposing the core ideals and philosophical principles common to Western liberal democracies.

The Cold War, nonetheless, debilitated the process of achieving greater unity worldwide, making a significant progress in legal terms unlikely. Even the Universal Declaration of Human Rights (UDHR), regarded as undisputed historic triumph today, was not, in fact, celebrated likewise at the time of its proclamation. An observer from the International Law Association, at the meeting of ECOSOC, stated openly that the best way to celebrate UDHR is to forget about it (Beats 2010). The declaration's aspirational character and lack of enforcement have simply led too many to regard it as practically worthless (Greer 2006). In 1949, the political climate in western states was, therefore, dominated by the fear that Europe was in danger to be overrun by the communists and, also by the possibility of the rise of another Hitler (Beats 2010). Various European movements, fuelled by the fear of totalitarianism, and communism arose throughout the European democracies, building a new political discourse on the notion

of human rights, often inspired by the language of UDHR, although the initial moves to create a European Convention pre-dated the adoption of UDHR (Moravcsik 2013). The International Committee of Movements for European unity then paved the way for the Council of Europe (CoE), established on the 5th of May 1949 (Rainey 2014). CoE was founded in Strasbourg by ten West European liberal democracies as one of the Cold War initiatives to promote common identity and values (Greer 2006). Its primary aim was according to Art. 1(a) of Statue of the Council of Europe: 'to achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress' (Art. 1(a) of the Statue). The main principles of the CoE, are established in Art. 3 of the Statue, and include, pluralist democracy, respect for the human rights and rule of law (Shaw 2014).

The conditions for the admission of a state to the CoE are laid down in the same article. The state must be a genuine democracy that respects the rule of law, human rights and collaborates effectively with the Council in these domains. In practice, that involves becoming a party to the European Convention on Human Rights (ECHR) (Moravcsik 2013). The primary reason for a sudden increase in the number of member states in the 1990s was the collapse of communism in the Soviet Empire and its European satellites. Admission process provided the Council with some, although sometimes limited, influence over prospective members. Despite important shortcomings with regards to human rights and effective absence of the rule of law, even Russian Federation was admitted by the Council's Parliamentary Assembly in 1996. The decision was strongly criticized at the time (Moravcsik 2013). The CoE struggled to fix the problem of poor human rights record of some of the member states. It has moved beyond agreeing or noting commitments made at the time of application and approval to consideration of how these have been honored once the state gains the membership (Shaw 2014). The office of the high Commissioner for Human Rights who may issue opinions, make recommendations, and undertake visits was established (Greer 2006). However, after 26 years of membership, and mostly due to the act of aggression against Ukraine, the Committee of Ministers on the 16th of March 2022 decided, that in the context of the procedure launched under Article 8 of the Statute of the CoE, the Russian Federation ceases to be a member of the CoE. After the long list of human rights violations, including systematic non-compliance with the family life protection, possible war crimes and serious human rights violations that Russian Federation troops have possibly committed in Ukraine were just too much to bear for the CoE.

The main legal instruments of rights protection within CoE system

The Convention for the Protection of Human Rights and Fundamental Freedoms was signed on 4 Nov. 1950 and entered into force in Sep. 1953 (Shaw 2014). The convention is generally known as the European Convention on Human Rights. With activated European Court of Human Rights and functioning individual petition system, the ECHR is now the principal accomplishment of the CoE (Greer 2006). Yet, the convention was proposed, and recognized by many in the early days, as no more than necessary protection against tyranny guaranteeing only the bed rock democratic standards. There was an open skepticism about the idea of ECHR becoming some sort of comprehensive European Bill of rights (Beats 2010). Its substantial content reflects only the main concerns of the western liberal democracies discussed above. The ECHR is, therefore, substantially not very different from the International Covenant on Civil and Political Rights (ICCPR), and sixteen subsequent protocols that added further rights or instigated some procedural reforms are almost all essentially in this line (Shaw 2014). The convention focuses on the protection of civil and political rights with rather limited exceptions to this principle, particularly Art. 1 of the First Protocol which protects property rights and Art. 2 of the same Protocol, which guarantees the right to education (Rainey 2014). Yet, from the perspective of 1950, ECHR was largely perceived as practically almost irrelevant formal inter-State pact against totalitarianism, setting out European democratic values, without the compulsory Court, without the compulsory right of individual petition and with the international system of control unlikely to be ever invoked other than in extreme cases (Beats 2010). Inter-State complaints were largely a dead letter and for the first 30 years, ECHR had limited, occasional impact on individual victims of human rights violations. ECHR was, therefore, practically overlooked by lawyers and politicians alike. Yet, from the mid-1980s things began to change dramatically, with the individual applications on a steady rise. The system was, in fact, severely overloaded by late 1990s (Greer 2006).

When the convention came into force, only 3 out of 10 states opted for the right of individual petition, by the 1960s only 3 out of 13 withheld it, and by 1990 all 22 states had accepted it (Greer 2006). Yet, this sudden awaking brought along new controversies. Despite steadily grooving jurisprudence provoking judicial activism charges, member states continued to maintain their acceptances of the optional clauses, presumably, due to the fact, that jurisprudence simply reflected and developed further the common European values (Beats 2010). ECHR now provides an efficient

judicial process for adjudication of complains by individuals or member states, although, there is little that the CoE can practically do with a state persistently in violation, being short of suspending or expelling it from the CoE (Greer 2006). The violation of the family life protection agenda was not enough to expel Russian Federation, for example. Still, it can be safely concluded, that ECHR is the most robust system of human rights protection at CoE disposal, and it focuses almost exclusively on the political and civil rights.

However, CoE system of rights protection surely cannot be reduced to ECHR alone. Apart from the ECHR, over 200 treaties, focusing on a wide range of issues including human rights, have been signed under the umbrella of the CoE (Greer 2006). The European Social Charter (ESC) is particularly important as the notion that 'there is rather too much focus on the protection of civil and political rights', seems more likely to suggest that some other important rights are omitted or marginalized, than simply denouncing existing protection as too intensive or focused. Complementary to civil and political rights, social and cultural rights are commonly recognized, as for example, within the UDHR (Steiner, Alston 1996). Although it is often philosophically contested, these rights and their realization depend more upon the economic resources of the state, than the civil and political rights. It was, therefore, particularly difficult to find a meaningful compromise and reach an effective agreement due to wide social and economic differences between the member states. The negotiation process of the ESC took seven years (Shaw 2014). Charter was open for signature in 1961, and the Revised ESC opened for signature in 1996 (Cullen 2009). The 1961 version of ESC protects nineteen social rights:

"The right to work, the right to just conditions of work, the right to safe and healthy working conditions, the right to a fair remuneration, the right to organise, the right to bargain collectively, the right of children and young persons to protection, the right of employed women to protection, the right to vocational guidance, the right to vocational training, the right to protection of health, the right to social security, the right to social and medical assistance, the right to benefit from social welfare services, the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement, the right of the family to social, legal and economic protection, the right of mothers and children to social and economic protection, the right to engage in a gainful occupation in the territory of other contracting parties the right to migrant worker assistance" (Cullen 2009).

The revised ESC gathered the rights contained in the 1961 instrument and four more rights were added by the Additional Protocol, signed in

1988, that came into force in 1999. These rights are further guaranteeing equal opportunities in employment without discrimination based on sex, information, and consultations of workers within the undertaking, participation in the determination and improvement of working conditions, and social protection of elderly persons (Shaw 2014). However, ESC always lived in the shadow of the high-profile ECHR and there is no agreement among scholars on its value. Some see it as another sleeping beauty with a potential to wake up, whereas others consider the ESC to be no more than a signpost of European social policies (Clauwaert, 2016). Nevertheless, considerable progress, in terms of the protection and recognition of these rights has been made and can hardly be denied.

In 2009, 39 of member states were parties to one or both Charters, with 27 ratifications of the ESC, and 25 ratifications of the Revised ESC (1996) (Cullen 2009). As of March 2016, 43 member states have ratified the Charter of which 34 are bound by the 1996 Charter and 9 by the 1961 Charter. Only 4 states within the CoE system have not yet ratified ESC: Liechtenstein, Monaco, San Marino and Switzerland (Clauwaert, 2016). The Charter comprises long-term objectives and the resulting list of rights: labor rights and trade union rights, the protection of specific groups such as children, women, disabled persons and migrant workers, social security rights and protection of the family (Shaw 2014). The existing social and economic disparities between the European states made a substantial variability in the range of obligations potentially undertaken by states practically necessary. Instead of taking on all the obligations automatically, state parties indicate which provisions they accept (Cullen 2009). The charter operates on the system where only 10 out of the 45 paragraphs need to be accepted upon ratification, providing the 5 obligatory paragraphs were among them (Shaw 2014). This system is set out in Art. 20 ESC and Art. A of the Revised ESC, requiring states to accept only a certain minimum of obligations. State parties are then obliged to report on their actual advancement in implementing the accepted provisions every two years for core provisions and every four years for other provisions (Cullen 2009). These have been, since 2007, divided into 4 thematic groups: employment, training, and equal opportunities; health, social security, and social protection; labor rights; children, families, and migrants (Shaw 2014).

Under the ESC, as amended by the Turin Protocol 1991 and revised in 1996, the European Committee of Social Rights (ECSR) has the exclusive quasi-judicial competence to assess from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter and its conclusions are published (Clauwaert, 2016). 'Although

the ESC is not subject to judicial enforcement, the ECSR subjects periodic state reports to fairly rigorous scrutiny, with explicit paragraph-by-paragraph judgments of conformity or non-conformity' (Donelly 2014). If a state found in violation of the ESC by ECSR does not implement a decision, then the Committee of Ministers addresses a recommendation to the state (Shaw 2014).

The Protocol creating a system of collective complaints under the ESC, that came into force in 1998, provided the ECSR with the capability to hear collective complaints (Cullen 2009). Selected NGOs, employers, and worker's organizations have been since then authorized to file complaints and their representatives are further involved in the following procedures (Donelly 2014). However, ECSR still makes an authoritative decision on both admissibility and merits (Shaw 2014). Nevertheless, when it issues a summary report on the conclusions forwarded to the Governmental Committee (GC), composed of a representative of states with the right to vote, joined by the representatives of the social partners, trade unions and NGOs who may discuss any issue, even if these partners cannot vote. The GC, representatives of states, then decide whether they will recommend to the Committee of Minsters, to issue the only available endorsement, the recommendation (Clauwaert, 2016). The role of the Governmental Committee and the Committee of Ministers in deciding authoritatively whether the cases of non-compliance identified by the ECSR should be the subject of a recommendation is highly politicized and subject to much criticism (Cullen 2009). This process can be reasonably described as missed opportunity to scrutinize the identified violations in Europe, and it is far from perfect (Clauwaert, 2016). Nevertheless, neither the substance of the ESC nor the implementation process should be overlooked or denounced. The substance goes well beyond the ICESCR with the entrenched rights and principles and review processes are still considerably more rigorous than those under ICESCR or ICCPR (Donelly 2014). It is an essential and important mechanism for maintaining a durable commitment to social and economic justice in Europe, even though its profile remains low and its impact weak (De Búrca 2005). The protection of social and economic aspects of the family life through such instrument is certainly not perfect, yet the mechanism is not entirely meaningless either.

Conclusions

The CoE system of rights protection was born out of the fear of totalitarianism and communism. Political and civil rights were clearly paramount in the early days and they still are. There is no doubt that the most effective

instrument within the CoE system of rights protection, ECHR, is focused almost exclusively on the political and civil rights while social and economic rights are largely absent. However, the whole CoE system of rights protection cannot be reduced to the ECHR alone. There are other mechanisms such as the high Commissioner for Human Rights office and many separate treaties relevant to the protection of human rights. The ESC is an important part of the CoE human rights protection system, focusing exclusively on social and economic rights. Unfortunately, ESC is not able to scrutinize all the alleged violations, there is no judicial enforcement and procedures are politicized. This mechanism cannot provide comprehensive protection to the right of the family to social and economic protection. CoE cannot directly cause any radical policy change in this regard. The profile of ESC, therefore, remains low, and its impact is portrayed as rather weak in comparison to the ECHR. The charter, however, provides substantively more demanding list of rights and noticeably deeper review process than ICESCR. It is correct to conclude, that the CoE system of rights protection protects the culturally progressive interpretation of the family life through the individual complain mechanism of ECHR, while the actual protection of social and economic rights is lagging behind. Despite many reaffirmations of the indivisibility, interdependence and interrelatedness of all human rights, political and civil rights remain politically privileged. There is little doubt that this state of the matters affects the real protection of all family models, regardless of the progressive definitions.

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Mgr. Petr Kocina, PhD., LL.M.
Department of Ethics and Aesthetics
Constantine the Philosopher University in Nitra
Hodžova 1,
949 74 Nitra
Slovak Republic
pkocina@ukf.sk