SYSTEMATIC VIOLATION OF THE RIGHT TO SAFE AND HEALTHY WORKING CONDITIONS AS A POLITICAL CHOICE: SOMA MINE DISASTER

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INTRODUCTION

The process of mining coal, the consumption of which became widespread especially after the industrial revolution, necessitates due care in a humane and social sense. Since coal mining is performed at great depths, and when it is necessary to mine the coal from narrow galleries, it becomes an activity requiring manual labour, which does not allow full mechanization. Thus, it continues to be a challenging and risky occupation for employees, even if the practice is performed in accordance with all rules and safety requirements.

The risky nature of the mining activity means that there is a direct correlation between mineworkers’ right to life, which is imperilled by entering the mine, and their social rights that they gain as a result of the strong solidarity of the miners as well as their collective struggles. When comparing the working conditions of other occupations with the conditions at mines during the 18th and 19th centuries, when coal mining was first developed, they were far more inhumane, beneath human dignity, directly threatening the workers’ health, safety, and lives. The relative improvement of the conditions occurred in connection with the development of social rights. Today, the abundance and deadly results of mine accidents in countries such as Turkey, which adopt the slogan ‘rapid growth, higher production and lower costs’ and ignore all other kinds of values and social rights, prove this connection. Here we should recall that Turkey has the most mining accident fatalities in the world.

While neoliberal policies promise a better life to those living above the ground in Turkey, they adopt a discourse of normalization of poverty and death to those condemned to work below the ground. While these policies constitute a breach of the social rights of the mineworkers, one of the worst impacts of this situation occurred in Soma. The accident happened in Eynez Mine, worked by Soma Coal Enterprises Inc., on 13 May 2014, resulting in the loss of 301 lives, a national disaster.

The Soma disaster constitutes a typical example of ignoring the regulations related to worker rights and working conditions regulated under the Revised European Social Charter

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2 One day following the Soma disaster, the then PM gave examples from mine blasts in the 1800s during his press conference, and mentioned the accidents and their results saying: “These are usual things. There is an incident called work accident in the literature. These are in the nature of this work. There is no such thing as ‘there will not be any accidents’”. “Erdoğan: These are in the nature of this work”, Sol Portal, 14 May 2014, (http://haber.sol.org.tr/devlet-ve-siyaset/erdogan-bu-isin-fitratinda-var-haberi-92417. Access Date: 13.08.2014).
The most explicitly violated right was the right to safe and healthy working conditions regulated under Article 3.

1. MINEWORKERS’ STATUS AND ITS PRECARITY

1. Condemned to Work at an Unsafe Mine As a Result of Limited Employment Opportunities

In order to understand the Soma disaster and its relationship with social rights, it is necessary to refer especially to the economic policies applied in the region, and to relate the subject in context.

The region where Soma is found is among Turkey’s agricultural cultivation areas, and those who used to farm in the surrounding villages and towns had to become mineworkers, owing to policies eliminating agricultural activities.

On this very point, the government’s function of securing social rights and balancing financial inequality comes to the forefront. While no explicit forced labour was observed in Soma under article 1/2 of ESC Revised, it is difficult to say that individuals work in the mines of “their own free will” due to the social conditions. The desire of the workers to get back to mine so shortly after the Soma disaster, even being conscious of the safety issue, is further evidence of the fact of being condemned to the mine. The political preferences of the government highlight the indifference to this issue.

Another point is the impact of coalmine privatizations on the workers. Just as in many countries, the first coalmines were opened in Turkey as a result of private enterprise, and these mines were later nationalized. The mines were again handed over to the private sector during the periods when liberal economic policies were adopted, leading to a regression in social rights. Basically, two results of the privatization practices are observed in terms of workers’ social rights.

First of all, after the privatization of the mines, the private enterprises operated on the principle of profitability, paying low wages to the workers to reduce operating costs. According to research, there are differences between workers in the public sector and workers in the private sector. The administration does not take serious measures in the remuneration policy that the owner of the enterprise applies during the handover of the mine enterprises to the private sector. It may be inferred that this situation threatens the right to fair remuneration protected under Article 4 of ESC Revised.

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3 ESC Revised was submitted for signing on 3 May 1996 and enforced on 1 July 1996; It was signed by Turkey on 6 October 2004, approved on 27 September 2006 under Law no. 5547 (Official Gazette 03.10.2006, 26308) The legal liability for ESC Revised was assumed as of 9 April 2007 in domestic law [2007/11907 (Revised) Decision on Approval of European Social Charter with Declaration, OG 09.04.2007, 26488], and as of 27 June 2007 in international law (http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/overview_EN.asp?).

4 It is observed that the right to work (Article 1), right to just conditions of work (Article 2), and right to fair remuneration (Article 4) are also impacted, yet indirectly, due to the policies and social acts carried out by the government.

5 When the first coalmines were opened in Turkey, it was difficult to find workers to work there, because the farmers wanted to continue working in agriculture. Ultimately, it was necessary to bring forced labor liability to run the mines. Gürboğa, 2014: 36, 38.

Privatizations cause also problems in health and safety at work. There should actually be no difference between the running of a mine by the private sector or by the government in terms of health and safety at work. Since regardless of who runs the mine, the same rules should be applied. However, historical experience shows that the reality is not like this, and more accidents, of greater severity, occur in mines run by the private sector. In the cases where the Administration comes to the forefront only in the audit process in mines operated by the private sector, and when they fail to fulfil such mission deliberately or negligently just like in Soma, the workers are exposed to the mercy of the operator, whose fundamental purpose is to increase production and reduce cost in any event. Hence running of the mines by the private sector makes working conditions, which are already harsh especially in terms of social rights, unbearable.

2. Public Procurement as an Ignored Protection Opportunity

Another feature of Soma is the fact that it is Turkey’s most extensive lignite site. Thus, large-scale mining activity is carried out here. A part of the lignite mines is run by government, and some by the private sector, and a couple of the mines operated by the private sector are taken over from the government. Eynez Mine, where the accident happened, is among this type of mine. The license holder of this mine is a public institution, the General Directorate of Turkish Coal (GDTC). The current operator, Soma A.Ş., runs the mine with a “royalty agreement” that it signed with the administration.

Highlighting the legal relationship between Soma A.Ş. and GDTC is of great importance in terms of determining what GDTC can do to ensure the safety of the workers in the mine. Soma A.Ş. produces minimum 1 million tons of coal in Eynez Mine per annum, and it pays a royalty, meaning counter balance, to GDTC on this coal. While GDTC receives royalty as coal, it also uses its pre-emptive right and buys all the coal that Soma A.Ş. produces as raw material. The coal bought is cleaned and packaged by Soma A.Ş. After the coal is bought, another fee is paid for these transactions. This data demonstrates that there is a relationship between GDTC and Soma A.Ş. from the mining of the coal to making it ready for use. Thus, GDTC has the potential to be influential by going beyond the classic enforcement audit that the administration would conduct on working conditions throughout this process. However, it is observed that this opportunity is not availed of, either in the procurement process made to determine the contractor, or during the operations.

Royalty biddings are carried out as per the directive issued by GDTC – the institution making the bidding- in contravention of the general procurement regime in Turkey. Apart

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8 Of course one should not infer that mines operated by governments are free of risk. Above all, while mining is a risky line of business, damaging human health “due to its nature”, and it is possible to minimize this danger, the working conditions of mineworkers are especially problematic in terms of health, even if there is no accident. The historical data demonstrates that there are social rights breaches in mines operated by the government. Please see Gürboğa, Nurşen (2014) “Erken Cumhuriyet, Devir Değişti Zulüm Değşmedi”, #tarih, S. 1, Haziran, 37-38. However, while the efficiency principle is valid for public enterprises as well, it is a reality that accidents and losses are fewer in parallel with the fact that the operator does not have direct personal revenue.

9 GDTC General Management Royalty Implementation Directive enforced with GDTC Board’s resolution dated 30.03.2007 and numbered 5/244
from the provision in the general statement under Article 8, no other noteworthy liability is seen in terms of workers’ rights and working conditions under this directive.

Further to this regulation, the liabilities of the administration arising from the Mining Law and its directions must be met by the operator on behalf of the administration. As when the current regulations are taken into consideration, the prerequisites of mining legislation should be fulfilled by the license holder GDTC\textsuperscript{10}, and the requirements of health and safety at work should be assumed by the royalty holder, Soma A.Ş. Hence, the administration, that is to say GDTC, will be able to determine under the agreement the liabilities arising from the mining regulation, and the applicable penalties when these liabilities are not met. As the regulations pertaining to health and safety at work are found among these liabilities, the operator undertakes said liabilities of the administrator.

Pursuant to the provision, GDTC’s wishes pertaining to the staff that the operator will recruit; the safety precautions to be applied by the operator, and the issues on penalties and how they will be applied, shall be regulated under the agreement. In other words, it is possible for GDTC to make requests with respect to the safety of the staff working in the enterprise. However, there is no provision under the Directive, which specifically regulates this issue. Thus, the issue is left fully to GDTC’s discretion and desire. GDTC did not put any effort into protecting workers’ rights.

This fact is not limited to the operation of mines but is actually a typical situation valid for all public procurements. Not to define the assurance for workers in procurements becomes a characteristic feature in Turkey. It is clearly put forth in the Committee’s 2013 evaluation that Turkey consistently fails to fulfil its liabilities under the ILO Convention numbered 94, concerning the working conditions to be set in public contacts that Turkey approved in 1961\textsuperscript{11}. As public procurements are a major factor in terms of goods and services produced in the country, the placing of additional provisions on the specification on this issue by the tendering administrations is an effective method in terms of implementation of policies on protecting social rights. As a matter of fact, under the European Union directive (2014/24/EC) dated 6 February 2014 on Public Procurements there are clear and concrete regulations to facilitate appropriate integration of the environmental, and social and labour law requirements into public procurement procedures.

4. Precarity Created by the Employment Conditions of Mineworkers in Soma

Pursuant to Labour Law, it is essential for an employer to perform production by means of its own employees. However, with the impact of globalization and neoliberal policies since the 1980s, enterprises began to adopt strategies in line with the competitive conditions in

\textsuperscript{10} Please see Mining Law Supplementary Article 7, Mining Activities Practice Regulation Article 100/2 and provisional Article 1.

\textsuperscript{11} It is stated under the evaluation that there is no legal regulation in Turkey on this issue, and the issues on bringing liability to the bidding contractor during the public tender processes, with respect to the employees, while offering goods or services, are not stipulated. Turkey fails to send the committee the statistical data, audit reports, the copies of official documents – such as the Public Procurement Institution Report- pertaining to the subject. Please see Direct Request (CEACR) - adopted 2013, published 103rd ILC session (2014), Labor Clauses (Public Contracts) Convention, 1949 (No. 94) - Turkey (Ratification: 1961) (http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3129399, Access date: 04.09.2014).
global markets, and adopted the outsourcing strategy for production and employment as a flexibility tool. The outsource-dependent nature of the mine in Soma is crucial in terms of the statistical data on the frequency of labour accidents\(^\text{12}\).

The legislator in Turkey subjects outsourcing of employment to strict conditions. Establishment of principal employer and subcontractor relationships, which is the main form of outsourcing of employment, is deemed valid as limited to carry out work “in auxiliary activities or in a certain section of the main activity due to operational and occupational requirements, and requiring expertise due to technological reasons”, as per the provision of Article 2 of Labour Law.

According to the media after the Soma disaster, there were illegal subcontractor relations in the mine, and this situation paved the way for the said disaster. Put another way, there is a relationship between the license holder and the royalty owner Soma A.Ş. that is looser than just providing employees, but this relationship does not include independency as a leasing agreement. Both the license holder and the royalty owner Soma A.Ş. have independent business organizations. However, the royalty owner Soma A.Ş.’s business organization is established to produce goods for the license holder’s business organization.

In this case, it is understood that it is desired to establish a subcontractor relationship between the license holder and the royalty owner Soma A.Ş., however the ban on indivisibility of main activity was breached, and mining production work, which is the main work and is also conducted by the license holder, is divided and given to the royalty owner Soma A.Ş. even though the operational and occupational requirements and the activity do not require expertise due to technological reasons.

Moreover, it is alleged in the media that Soma A.Ş. handed over work to the subcontractor. According to said media, Soma A.Ş. assigned 4 different subcontractors to the mine. These are subcontractors colloquially known as foreman, composed of (worker contractor, funnel contractor, pillar contractor and abutment contractor\(^\text{13}\). The Soma disaster is considered to be the result of illegal principal employer – subcontractor practices. The principal employer – subcontractor relationship established to reduce production costs without abiding by legal limitations is the basic factor paving the way for the Soma disaster.

**II. VIOLATION OF THE RIGHT TO SAFE AND HEALTHY WORKING CONDITIONS**

“The right (Article 3) to safe and healthy working conditions” is the right, which is regulated under ESC Revised’s catalogue, and directly pertaining to the Soma disaster. In order to fulfil this right, governments need to create and apply a consistent national policy on health and safety at work, and about the working environment. It is required to minimize the causes of danger arising from the nature of the working environment, such as in mines, and they should aim to prevent illnesses and accidents occurring during the work. These targets can be attained by preparing regulations, conducting audits, and supporting the development of the services related to health and safety at work.

\(^{12}\) According to the statistical data, the principal employer and subcontractor relationship is behind most of the major mining disasters occurring after 2002. Please see the Union of Chambers of Turkish Engineers and Architects, Research Commission for Chamber of Mining Engineers’ (2014) Soma Disaster Preliminary Report, 14, Table 1.

These purposes are of the nature of domestic legal regulations in terms of the Turkish national legal order. According to Article 90 of the Turkish Constitution, international agreements have statutory provisions, and those pertaining to human rights are accorded priority as per the laws. In that sense, the related Turkish official bodies are liable for protecting ESC Revised’s provisions. These liabilities should not only include making regulations, but also ensuring that rights are fulfilled. As social rights is a two-dimensional subject in regulation and practice. Thus, when examining the Soma disaster, the practice should be reviewed carefully in addition to the legal regulation, and thus the deficiencies arising therefrom should also be examined.

1. General Overview of Occupational Health and Safety Legislation and Relative Adequacy

Occupational health and safety, which is the main area of focus of the Soma disaster, is regulated under Occupational Health and Safety Law no. 6331, aiming at alignment with EU directives.

From the point of view of prevention and protection in parallel with the modern notion of occupational health and safety, the Law stipulates quite a comprehensive system in terms of ensuring the establishment of extensive occupational health and safety organization at workplaces, conducting risk evaluation, determining measures, auditing, and coordination of employers in the same workplace in occupational health and safety. The said regulations are applied to all activities and workplaces, as well as all employers and workers of these workplaces, belonging to the public and private sector, regardless of their area of activity.

It is evident that Law no. 6331 is applied for mines. Mining Law and Occupational Health and Safety Regulation at Mining Workplaces are also applied in terms of mines. Even though the said regulations contain some deficiencies and issues open for criticism, they are generally to-the-point regulations. In that sense, apart from some points, it can be said that the problems arise basically from practice and failure in stipulating an efficient audit system.

The most significant of these deficiencies in terms of the Soma disaster is the fact that Turkey has not yet signed ILO’s Safety and Health in Mines Convention no. 176 even after 19 years. Though there are provisions pertaining to safety in mines under domestic law, the fact that rescue chambers are not compulsory was discussed after the Soma disaster, and civil society invited the government to sign the agreement number 176.

Turkey’s signing of this agreement is actually not a determinant factor on the government’s liability to pass regulations. As, even if there is no concrete liability to apply the norm, the administration has the liability to make regulations arising from its duty to protect fundamental rights and freedoms, and to apply the law as stipulated under Constitutional law and international and regional human rights agreements. Pursuant to the lateral impact of the rights, the government should take all steps and necessary precautions in order to prevent


private sector activities from violating human rights. When the right to life is threatened, just like in Soma, the government is liable for making the necessary arrangements, and taking every sort of measure as per its positive execution liability. (European Court of Human Rights, 30 November 2004, Öneryıldız/Turkey, no: 48939/99). Thus, if the establishment of rescue chambers is compulsory scientifically and technically in order to ensure the right to life in a mine, the absence of such a regulation under a legal order cannot be explained through lawmakers’ or the administration’s will. Furthermore, pursuant to fulfilling the requirement of the provision of article 3/1 of ESC Revised, it is liable for meeting the necessary regulations concerning mines in order to ensure “prevention of accidents and injury to health arising out of, linked with, or occurring in the course of work, particularly by minimizing the causes of hazards inherent in the working environment”. Social rights and the right to life are intertwined here and, further to positive execution liability and the lateral impact of the rights, it is necessary to pass regulations.

2. Violation of the Right to Refuse Work

Further to Law No. 6331, employees are vested with the right to refuse work in the event of severe and imminent danger. This right is one of the projections of the right to safe and healthy working conditions governed under ESC Revised. Workers may refuse work by following a certain procedure until the necessary measures are taken at the workplace. Moreover, it is stated that in cases where severe and imminent danger cannot be prevented, the workers can abandon the workplace or the dangerous site, without being subject to this procedure, and go to the safe place determined, and their rights cannot be restricted in terms of these acts. The remunerations of workers in these periods, and other rights arising from the labour contract, are explicitly reserved.

The important thing is to determine whether or not there was a severe and imminent danger in the Soma disaster. Reports pertaining to the subject, and the information collected from the media, clearly indicate that the disaster was foreseeable. Only fifteen days before the Soma disaster, a motion17 presented to the Turkish Grand National Assembly about researching the dangerous working environment at Soma mine, was rejected by parliament, where the governing party held the majority. Under the current circumstances, the presentation of such a motion put forth that the employees were faced with severe and imminent danger. However, the employees had never used their right to refuse work due to their precarity, and this regulation remained non-functional.

The unlawful situation still continues. It is followed in the media that, shortly after the Soma disaster, the mineworkers were called again to work underground, without taking any new occupational health and safety precautions.

3. Violation of Audit Liabilities

Within the scope of providing safe and healthy working conditions, the right to ensure application of the regulation via audit is governed under ESC Revised. This audit can be an internal audit conducted by an occupational safety specialist, and audits made by union and audit by the administration.

17 “Parliament rejected to ‘investigate’ Soma on April 29”, Radikal, 13 May 2014 (http://www.radikal.com.tr/turkiye/meclis_somayi_arastirmayi_29_nisanda_reddetti-1191922, Access Date: 15.08.2014)
a. Violation of audit liabilities by the administration

Pursuant to its liability to ensure that the current regulations are applied, the administration is liable for auditing whether the rules of mining law and rules of occupational health and safety are observed at the workplace. This liability arises both from domestic law and regional regulations. The audit liability is clearly stipulated under the provision of Article 3/3 of ESC Revised.

According to domestic law, there is more than one administration responsible for auditing, and these administrations are the Ministry of Energy and Natural Resources (MENR) assigned in mining law, and the Ministry of Labour and Social Security in charge of occupational health and safety. The responsibility to meet the liabilities pertaining to mining law belongs to the license holder, namely GDTC, as per mining legislation.

Audits on occupational health and safety are executed by competent officials of MENR. The administration is responsible for imposing sanctions against illegalities identified by the audits.

One of the most striking aspects of the Soma disaster was the fact that the mine was audited regularly prior to the disaster. However, the said mine was classified as safe and smooth in all audits. According to the media, the audits were performed carelessly owing to the relationship of the employer with the administration. It is evident that such type of relations leads to weakness in audits. Moreover, research conducted in China about dangerous occupations, including mining, demonstrates the consequences of an ‘old-boy network’ between the employer and politicians. The research also puts forth that the rate of worker deaths is five times greater at politically connected companies than at similar companies that lack such connections\textsuperscript{18}. These evaluations mean that the related administration does not fulfil their audit duties, and thus the provision under Article 3/3 of ESC Revised was violated in Soma.

b. Ineffectiveness of the audit conducted by occupational safety specialists

Further to Law no. 6331, the employer is required to assign an occupational safety specialist among its workers in order to prevent occupational risks, and offer occupational health and safety services in such a way as to include works towards protection from such risks.

Even though it is stated in Law (Article 8/I) that the occupational safety specialists shall conduct their duties within the scope of ethical principles and occupational independency required by the job, this statement does not have validity in practice. Since these specialists are themselves employees, it would be impossible to consider the independence of an employee who is economically dependent on the employer. There are no assurances under regulation and in practice, ensuring the independence of these individuals, and this situation makes it difficult to exercise audit authority\textsuperscript{19}.

c. Dysfunction of the Union-based audit mechanism

\textsuperscript{18}Fisman and Wang: 2013.

\textsuperscript{19}In the same vein, “DISK (Confederation of Progressive Trade Unions of Turkey and) negotiated with the Ministry of Energy about the problems in Soma, and requests relating to a solution!” (http://www.disk.org.tr/2014/07/disk-ve-dev-maden-sep-somadaki-sorunlar-ve-cozume-iliskin-talepler-hakkinda-enerji-bakaniyla-gorusu/, Access Date: 14.08.2014); see Union of Chambers of Turkish Engineers and Architects, Research Commission for Chamber of Mining Engineers’ (2014) Soma Disaster Preliminary Report, 18.
It is beyond dispute that in modern systems the Union has an active role in the area of occupational health and safety. The harsh working conditions of mineworkers, and the risky nature of the mining activity, have led mineworkers to be the leaders in collective worker movements throughout history. Union play the most crucial role in workers’ collective struggle. Article 5 of ESC Revised governs the right to organization. Protecting occupational health and safety of workers’, and improving their workplace environments, are the main organizational duties of the Unions.

However, the impacts of neoliberalism in Turkey after 1980, as well as the political climate, dragged the Unions to crisis, and led to drastic reductions in their member numbers, while the application of pressure by the government on them, finally weakening their organization capacity. This situation primarily affected occupational health and safety and, after 1980, the status of mines regressed in terms of occupational health and safety.

The Soma disaster is a consequence of this scenario. According to the media published after the disaster, a devil’s triangle was mentioned, composed of Union, employer and political parties. Following the disaster, the employees and their relatives protested, claiming that the union did not stand up for them but for the employer, and the chairman and board of directors (composed of five members) of Turkey Mining Workers Union were forced by the workers to resign. The said union managers had to resign on May 26, 2014.

Pursuant to ILO’s Convention no. 176, measures should be taken, in accordance with national laws and regulations, to encourage cooperation between employers and workers and their representatives to promote safety and health in mines (Article 15). As can be seen, the social dialogue system stipulated by supranational norms should be established among employee-employer-employee representatives, instead of a devil’s triangle among syndicate-employer-political parties as in Soma.

CONCLUSION

It is clearly evident that each of the actors authorized in the management of risk and emergency in the Soma disaster failed to fulfil their duties. However, the issue is beyond accidental, illegal practice.

Regardless of the fact that mines are operated either by the government or the private sector, and besides the adverse working conditions, working in mining itself and condemnation to such should be questioned. The workers in Soma are left in peril as a result of illegal outsourcing of employment, and elimination of alternative employment and occupational health and safety.
production areas, due to economic policies. On the other hand, the methods of collective struggle are blocked by inhibiting strong Unions from becoming organized, and forcing the workers into Unions with political connections. This situation causes mineworkers to be constrained to working in the mine, under primitive conditions.

When the mining enterprise is considered, it can be seen that there is no sensitivity towards workers’ rights, right from the procurement procedure. Ignoring social rights in procurement, execution of audits for show, and claims about the existence of personal relations between the auditors and the officials of audited institutions, are worrying issues.

When the issue is approached in terms of B2B relations, the picture gets foggier. As Soma Inc. sells the coal it mines to the General Directorate of Turkish Coal (GDTC), which reports to the Ministry of Energy and Natural Resources, and makes this coal ready for use. While the quality of the coalmines is considerably low, the purpose of increasing production and reducing cost is also adopted by the institution, which buys the coal, and is actually required to audit Soma Inc. within the scope of contract relations.

When the practices of administration are evaluated along with the legal regulations, the accident that happened in Soma can be considered as the inevitable result of political choice, and legal manifestation of this choice. It is not incidental that Turkey fails to implement a tender system protecting environmental and social values. On the contrary, it makes new regulations for the purpose of deviation from current rules. Its failure to sign the ILO Convention numbered 176, and to establish an efficient audit mechanism, is the expression of a political will. However, this expression is not only problematic in political terms but also legally, considering the rights that the government is liable for protecting pursuant to the European Convention on Human Rights and Revised European Social Charter.