

THE EUROPEAN SOCIAL CHARTER – INSTRUMENTS AND PROCEDURES

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Abstract: *The European Social Charter is the only comprehensive human rights convention guaranteeing social and economic rights at the European level. The article presents an overview of the several instruments now forming the Charter, its structure and the substantive rights protected and outlines the supervisory procedures including the novel Collective Complaints Procedure under which trade unions, employers' associations, and NGOs may file complaints against Contracting Parties.*

Key words: Collective Complaints, Council of Europe, European Social Charter, Social and Economic Rights

A. GENESIS, RELATIONS

The European Social Charter (ESC) is a counterpart to the European Convention on Human Rights and Fundamental Freedoms, November 4, 1950, CETS 5 (ECHR).¹ The Convention essentially protects only civil and political rights. The object of the Charter is to provide a “pendant” to the ECHR in realizing the aims of the Council of Europe in the field of human rights by securing social and economic rights.

When the ECHR was drafted and adopted in 1950, social and economic rights were put aside for reasons of priorities and tactics. A follow-up was however intended and a drafting process was initiated already the following year. A comprehensive preparatory process within the Council of Europe organization resulted in the Charter being signed by 13 Member States on October 18, 1961 (CETS 35). It entered into force on February 26, 1965. Later, further instruments have been added to it.

At the regional level the Charter constitutes the foundation of social and economic

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¹ All Charter instruments, with ratification charts, etc., are available at the Council of Europe website for the European Social Charter, http://www.coe.int/T/E/Human_Rights/Esc/. Likewise, ECSR conclusions and collective complaints decisions, and recent national reports are accessible at the Charter website, where (under Resources) a regularly updated bibliography can also be found, which moreover lists the volumes of the “Social Charter Monograph Series” on different substantive topics, published by the ESC Secretariat/Council of Europe.

human rights protection in Europe. It coexists with the ECHR and a number of subject specific instruments. The relation between civil and political and social and economic rights is essential. The 1961 Charter is based on the fundamental principle of the interdependence and indivisibility of human rights – and so is the Revised Charter of 1996 (*see in B, infra*), as stated explicitly in its Preamble. Thus, there is no dichotomy between the instruments or categories of rights but, rather, an intrinsic relationship between them. This is evidenced, i.a., by the case law of both the European Court of Human Rights and ESC supervisory bodies.

So far, the ESC is the sole international *legal* instrument at European level which guarantees a comparatively wide and comprehensive set of social and economic rights. As such, like the ECHR, it has served as a source of influence on the draft EU Constitution chapter on protection of fundamental rights. The Charter has, on the other hand, drawn inspiration from developments in certain areas of EU legislation and case law, most apparent in some of the new provisions in the Revised Charter of 1996. In the global context the Charter is a precursor of and served in part as a model for the 1966 UN Covenant on Economic, Social and Cultural Rights (993 UNTS 3). There are also many parallels and strong links to ILO instruments, which to some extent served as models for ESC standards, albeit significant differences also exist. I.a., the ESC was the first international convention to explicitly recognize (in Article 6 para. 4) a right to industrial action, including a right to strike.

B. THE CHARTER – A SET OF INSTRUMENTS

The original Charter of 1961 has been expanded on and added to by a series of instruments. Resulting from an initiative taken in 1978 to add to the protection of social and economic rights an Additional Protocol to the ESC was adopted on May 5, 1988 (CETS 128), adding four rights to those in the 1961 Charter. The Protocol entered into force September 4, 1992. This effort did little, however, to improve on a rather dismal situation. In effect, the Charter had led merely a twilight existence in the Council of Europe sphere. By the end of the 1980s several factors converged to foster change. In part, internal changes transferring responsibility to the Directorate of Human Rights reinforced the Charter's position in the Council of Europe's human rights context. In part, developments within the EU with its adoption in 1989 of a Charter of Fundamental Social Rights of Workers, and developments in Central and Eastern Europe following the fall of the “iron curtain” each in their way brought new perspectives to the potential role and standing of the Charter and protection of social and economic rights. This led to a decision in 1990 to “revitalize” the Charter.

The first result of this process was the adoption of a Protocol amending the ESC October 21, 1991 (CETS 142). This Protocol deals exclusively with the Charter supervisory system, which had been considered a main point of concern. Notably, it clarifies the respective functions of the European Committee of Social Rights (ECSR, the body of independent experts) and the Governmental Committee, whereby the former has exclusive legal competence to interpret and apply the Charter. Further, provisions were added, i.a., with a view to reinforce the ECSR and its interaction with States in the supervisory procedure and reinforce the role of social partners and NGOs in the process of supervision. Technically, the Amending Protocol has yet to enter into force as it has not been ratified by all States concerned. However, fol-

lowing a unanimous decision of the Committee of Ministers in December, 1991, the Protocol's provisions are in all essentials in fact applied.

The second outcome of the "revitalization" process was the adoption of an Additional Protocol Providing for a System of Collective Complaints, of November 9, 1995 (CETS 158); which entered into force July 1, 1998. One of its main purposes, extending on the 1991 Amending Protocol, was again to increase the role of social partners and NGOs in the supervisory process. Complaints may be brought by certain categories of international or national trade unions or employers' organizations or NGOs. Complaints may be brought against States having ratified the 1995 Protocol and in respect of any obligations accepted by the State under the 1961 Charter, the 1988 Additional Protocol, or the Revised Charter.

The final result of the process was the adoption of the Revised European Social Charter (RevESC) (CETS 163), opened for signature May 3, 1996. It entered into force July 1, 1999. Building on the 1961 Charter, the Revised Charter was basically intended to update and adapt the substantive content of the old Charter, and supplement its provisions in light of social changes and developments since the adoption of the original text. Instead of drafting one or more amending protocols to the 1961 text, a decision was made to draft a single new instrument. The Revised Charter amends and adds to the original 19 rights of the 1961 Charter, incorporates the four rights in the 1988 Additional Protocol, and then adds eight new rights, thus bringing the total number of rights guaranteed to 31. Hence, the Revised Charter contains considerable improvements and offers a more comprehensive set of guarantees than does the 1961 Charter.

Rather than supersede the 1961 Charter, the Revised Charter as such is a new and separate instrument. States that have ratified the 1961 Charter are not bound by the Revised Charter unless the latter is ratified separately, in which case the State must undertake to be bound by at least the Revised Charter provisions corresponding to those the State is already bound by. Only in that case does the Revised Charter supersede the 1961 Charter for the State concerned.

C. STRUCTURE, UNDERTAKINGS, RATIFICATIONS

In terms of structure, the 1961 Charter and the Revised Charter are similar. The rights protected are listed in general terms in a Part I, which contains a policy commitment that is not legally binding. In Part II the rights are specified and made the subject of legal obligations. Part III sets out the undertakings that a State must accept in order to become a contracting party, and Part IV lays down the rules for the regular supervisory machinery that is based on the submission by States parties of periodic reports. Part V (RevESC Parts V and VI) contains ancillary provisions of various kinds including, i.a., on means of implementation by laws or collective agreements, etc., and, in Article E RevESC, a broadly framed non-discrimination clause. Finally, each instrument has an Appendix, which forms "an integral part of it", containing a series of clauses interpreting or adding to other provisions of the Charter/Revised Charter.

States ratifying the 1961 Charter may do so without accepting the totality of its provisions. Contracting parties have a choice of obligations in Part II, except that they must accept a minimum number of Articles or paragraphs. For this purpose, seven articles are collectively

identified as what is commonly referred to as the “hard core”. These are Articles 1 (the right to work), 5 (the right to organize), 6 (the right to bargain collectively), 12 (the right to social security), 13 (the right to social and medical assistance), 16 (the right of the family to social, legal and economic protection) and 19 (the right of migrant workers and their families to protection and assistance). Of these, at least five must be accepted. In addition, States must accept enough provisions to reach 10 articles or 45 numbered paragraphs, out of a total of 72.

The same arrangement is made in the Revised Charter, where the “hard core” has been expanded to nine articles. The new additions are Articles 7 (the right of children and young persons to protection) and 20 (the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex). Of these nine articles at least six must be accepted. Additionally, States must accept enough provisions to bring the total to at least 16 articles or 63 numbered paragraphs, out of a total of 98.

Unlike the ECHR, ratification of the Charter is not a precondition of membership of the Council of Europe. Out of the present 46 Member States, 38 have ratified either the 1961 Charter or the Revised Charter (as of December 31, 2006). Among them are all of the EU Member States. The number of provisions accepted by EU Member States and other contracting parties does vary, however. Of the 38 contracting parties, 22 have ratified the Revised Charter and 16 the 1961 Charter.

D. RIGHTS PROTECTED. CATEGORIES AND KEY PRINCIPLES

In very broad terms, the Charter’s substantive provisions can be divided into two main groups – *employment* and *social cohesion*. Articles 1–10 of the Charter fall under the first heading, along with Articles 20–22 and 24–29 of the Revised Charter. The second heading would include Articles 11–19 of the Charter, and Articles 23, 30 and 31 of the Revised Charter.

A finer division of the rights protected gives three main categories.

First, rights that, broadly speaking, pertain to work and employment protection. These rights pertain to four areas:

- the right to work, including the pursuance of full employment policies by States (Article 1) and the right to vocational guidance and vocational training (Articles 9 and 10); protection *in* employment and in the work environment, and *of* the employment relationship: the right to just conditions of work and to safe and healthy working conditions (Articles 2 and 3), now also including dignity at work (Article 26 RevESC); the right to a fair remuneration, including the right of women and men to equal pay for work of equal value (Article 4) and to equal opportunities and equal treatment more generally (Article 20 RevESC, and also Article 27 RevESC); and protection relating to termination of employment (Article 4 para. 4, Article 24 (and also Article 29) RevESC) and the safeguarding of remuneration (Article 4 para. 5, Article 25 RevESC);
- the right to organize and to bargain collectively (Articles 5 and 6), protection of workers’ representatives (Article 28 RevESC), and the right of workers to information, consultation and participation in decision-making in matters related to employment and working conditions (in particular Articles 21, 22 and also 29 RevESC); and

- special protection for certain categories of workers (“vulnerable groups”), i.e., children and young persons (Article 7), women (Article 8), persons with disabilities (Article 15) and migrant workers (Article 19, and also Article 18).

Second, provisions concerned with social protection for the whole of the population, i.e., regardless of their link to the labor market. They include the right to protection of health, to social security, social and medical assistance, and the right to benefit from social welfare services (Articles 11–14), and the right to protection against poverty and social exclusion and the right to housing (Articles 30 and 31 RevESC).

Third, special protection for certain categories (vulnerable groups) outside of the context of work. This includes rights of children and young persons (Article 17) and of disabled persons (Article 15), protection of the family (Article 16) and of elderly persons (Article 23 RevESC), and again migrant workers (Articles 18 and 19).

Grouping Charter provisions like this is merely intended to suggest the broad range of social and economic rights with which the Charters are concerned. Different groupings are conceivable. In any case, it is essential to emphasize the interrelationship between the groups and the various provisions. They cannot be conceived of as being concerned with either “individual” or “collective” rights, nor as pertaining either to “employment” or “social cohesion”. The Charters are concerned with safeguarding and promoting social and economic rights in a comprehensive and coherent way. Protection of basic democratic rights is an integral part in this. The importance of democratic and participation rights permeates the Charters’ provisions as a whole, ranging across topics as diverse as health and safety in the workplace and the rights of elderly persons living in institutions. Equally, the principle of non-discrimination is essential to the Charters as a whole, embodied in the Preamble to the 1961 Charter and further developed in Article E of the Revised Charter.

Referring back to the expressions “employment” and “social cohesion”, and again in general terms, the Charters can be seen to enounce a dual set of key principles which interlink their different provisions. The first being that every person should have the opportunity to work and, by their work, be able to earn an income sufficient to give the worker and his/her family a decent standard of living. Article 1 and Article 4 para. 1 (on fair remuneration) in particular should be seen as core expressions of this principle. Second, that social insurance and assistance schemes should be set up, on a solidary basis, to support those who are not able to earn such income and provide guarantees for all persons against falling into poverty and social exclusion.

E. SCOPE RATIONE PERSONAE

It is a characteristic feature of the Charter and Revised Charter that obligations undertaken by States are not universal in terms of personal scope. The rights guaranteed do not apply to “everyone”, or everyone within the territory or jurisdiction of the State. With minor reservations, the obligations ensuing from the Charters cover nationals of the contracting party and foreigners “only in so far as they are nationals of other Parties” *and* “are lawfully resident or regularly working within the territory of the Party concerned” (ESC/RevESC Appendix, item 1).

This restriction sets the Charters apart from other human rights instruments. It has been criticized and it is controversial in certain regards. But despite allegations of severely restricting the Charters' human rights character, the personal scope clause was maintained unchanged in the drafting and adopting of the Revised Charter.

F. THE SYSTEM OF SUPERVISION – GENERAL

Supervision of the Charters' implementation consists, first and foremost, of a *cyclical* activity – the examination of periodic reports from the contracting parties. Reporting originally was biennial; the intervals and subject subdivisions have since changed a number of times. As from 2007, a four year rotation scheme involving annual reports each on part of the provisions is employed. Second, there is the more novel and more occasional activity, reviewing collective complaints.

National reports and collective complaints are examined from a legal standpoint by the ECSR. The Committee is not a judicial body in the strict sense. However, within the supervisory machinery of the Charters it has exclusive legal authority, both in assessing national reports and investigating collective complaints. ECSR members are neither representatives of the contracting parties nor national representatives of the States that have nominated them for election. Members sit in their individual capacity and are independent experts; they are barred from holding office or performing functions incompatible with the incumbent requirements of independence and impartiality.

On completing an examination of national reports in a supervision cycle or part cycle, the ECSR makes its conclusions regarding the States and Charter provisions public. These conclusions are also communicated to the Governmental Committee, which is composed of one representative of each of the contracting parties. It is not vested with legal competencies and is not empowered to review the legal findings of the ECSR. Its task is to “prepare the decisions of the Committee of Ministers” on the basis of the conclusions adopted by the ECSR by selecting, and giving reasons for its choice, which situations in its view should be the subject of recommendations, on the basis of social, economic and other policy considerations. The conclusions that may give grounds for a recommendation are the “negative conclusions”, i.e., where the ECSR has found that a situation is not in compliance with the State's obligations under the Charter.

The Committee of Ministers is the final stage of the supervisory procedure. When acting as a control body of the application of the Charter, entitlement to vote in the Committee of Ministers is restricted to the contracting parties. On the basis of the report submitted by the Governmental Committee the Committee of Ministers may, i.a., adopt an individual recommendation addressed to a Member State having been found to be in breach of its Charter obligations. A number of such recommendations and in some cases repeated recommendations have been adopted over the years since the revision of the supervisory machinery with the 1991 Protocol.

G. THE COLLECTIVE COMPLAINTS PROCEDURE

This procedure is intended to complement the reporting system by providing direct access for certain organizations; see *supra*. It has traits parallel to those of the ILO procedure applicable to freedom of association matters. The Charter procedure however is considerably more far reaching, both in terms of the organizations entitled to lodge complaints and substantive scope of issues on which complaints may be made, the latter covering all provisions of the Charter accepted by the State Party in question.

The procedure is adversarial and shall proceed in writing. Oral hearings may, however, be conducted and have been used to some extent at the merits stage. Complaints are examined first with regard to admissibility, which is contingent on essentially formal criteria. If found admissible the case proceeds through further preparation to examination of the merits. The ECSR then shall draw up a report which it submits to the Committee of Ministers. On the basis of that report the Committee of Ministers shall adopt a resolution and, if the ECSR has found the State Party in question to be in breach of its obligations – i.e., that the Charter provision at issue “has not been applied in a satisfactory manner” – it shall address a recommendation to the State concerned.

The 1995 Collective Complaints Protocol has been ratified by 14 contracting parties so far. Since its entry into force in 1998, the ECSR has received 39 complaints, of which 33 have been decided by the Committee (three of them pending in the Committee of Ministers); only three were found inadmissible. Case law has contributed significantly on topics such as corporal punishment of children, the rights of disabled and of Roma, and working time

ECSR decisions and reports are made public, for merits decisions after a four month period allowing for finalization of the procedure in the Committee of Ministers.

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