

Taking Stock of the European Social Charter at 60: The European Social Charter and Equality*

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UDK: 349.2/.3:341.176(4)

1. INTRODUCTION

Looking back at the past 60 years after the European Social Charter started off in 1961, the principles of equality and non-discrimination were not fully developed. In the 1961 Charter, equality elements were expressly incorporated only for certain groups and areas, such as the rights of migrant workers to employment, or equal pay for work of equal value. Non-discrimination featured only in the Preamble. With the modernisation process in the 1990s and the Revised Charter of 1996, new rights were added, and Article E on the principle of non-discrimination became one of the key equality standards of the Charter.

2. EQUALITY STANDARDS IN THE CHARTER

The main equality standard, Article E, does not constitute an autonomous right which could in itself provide independent grounds for a complaint against a state party to the Charter but it does prohibit all forms of discrimination in the enjoyment of the rights set out in the Charter which are binding of course upon the state in question. In that sense, Article E is modelled on Article 14 of the European Convention on Human Rights.

According to the Committee, legislation should prohibit both direct and indirect discrimination. Direct discrimination is defined as “a difference in treatment between persons in comparable situations where it does not pursue a legitimate aim, is not based on objective and reasonable grounds or is not proportionate

* Published in the series of papers on the occasion of the 60th anniversary of the European Social Charter at <https://www.coe.int/en/web/european-social-charter/60-anniversary>.

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to the aim pursued.”¹ Indirect discrimination “may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.”² In recent cases, the Committee reviewed indirect discrimination by analysing whether the seemingly neutral legislation in question disproportionately and unjustifiably affected a particular group of persons.³ This is similar to the assessment applied by courts such as the ECtHR and the CJEU. Article E in conjunction with many rights of the Charter, such as the right to health, housing and social security, has generated rich case law of the Committee, as expressed in many decisions on collective complaints.

Besides the principle of non-discrimination expressed in Article E, there are also specific Charter rights that encompass the principle of equality.

Article 1(2) on the right of the worker to earn his or her living in an occupation freely entered upon

Given the wording and drafting history of Article 1(2), this provision focuses on the prevention and elimination of unfree labour. In the course of time, however, the Committee has developed extensive case law to broaden the scope of this provision to include various situations regarding rights to and at work, and of non-discrimination in the workplace.⁴

Article 15 on the right of persons with disabilities to independence, social integration and participation in the life of the community

¹ *Syndicat national des professions du tourisme v. France*, Collective Complaint No. 6/1999, decision on the merits of 10 October 2000, §§24-25; see also *Autism - Europe v. France*, Collective Complaint No. 13/2002. In the latter complaint, the Committee notes the strong similarities between Article E of the ESC and Article 14 of the ECHR and refers to the ECtHR’s interpretation of non-discrimination in the case *Thlimmenos v. Greece [GC]*, no. 34369/97, of 6 April 2000, CEDH 2000-IV, § 44; See also Conclusions XVI-1 (2002), Greece.

² See for example *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Collective Complaint No. 58/2009, decision on the merits of 25 June 2010, § 35.

³ See for example *Associazione sindacale « La Voce dei Giusti » v. Italy*, complaint no. 105/2014, decision on the merits of 14 October 16, §§ 63-81, <[https://hudoc.esc.coe.int/en/g/{%22ESCDcIdentifier%22:\[%22cc-105-2014-dmerits-en%22\]}](https://hudoc.esc.coe.int/en/g/{%22ESCDcIdentifier%22:[%22cc-105-2014-dmerits-en%22]}>)>, (20 January 2019). The Committee analysed whether there was a comparator group, whether disproportionate impact on the allegedly discriminated group was given, and whether the unequal treatment between the allegedly discriminated group and the comparator group was objectively justified.

⁴ Eduardo Ales, ‘Article 1 RESC: The Right to Work’, in: Eduardo Ales/Mark Bell/Olaf Deinert/Sophie Robin-Olivier, *International and European Labour Law* (C.H. Beck/Nomos/Hart 2018), 254.

Article 15 sets out equal citizenship for persons with disabilities. Here, the Committee emphasizes that equality of treatment must exist in law and practice, also between disabled persons who are foreigners and disabled persons who are nationals of the state concerned.⁵ Article 15 has led to a number of non-conformities by the States Parties that have ratified it, showing the gap between commitment and realisation of 'equal citizenship' for persons with disabilities in the Council of Europe states.

Article 17 on the rights of children and young persons to social, legal and economic protection

In view of the broad scope of Article 17, the Committee has developed extensive case law on this article. It considers, inter alia, the following aspects: the situation of children in poverty; the right to education. Quite a number of violations of the Charter relate to the discrimination of children with disabilities in education. The Committee was also concerned by the increase of child poverty, and the treatment of children who are irregular migrants, whether accompanied or not, and asylum-seeking children, in particular their access to appropriate and safe accommodation.⁶

Article 19 on the rights of migrant workers and their families to protection and assistance

This article sets out the obligation of states to treat migrant workers not less favourable than their own nationals in respect of matters such as remuneration, trade union rights, accommodation, and legal proceedings. Although it is one of the so-called 'hard core' provisions⁷ of the Charter, only a few States Parties have accepted all of the 12 provisions of Article 19. Some of its provisions continue to be among the most difficult ones to adhere to, and the Committee has found many non-conformities because of undue restrictions on the rights of migrant workers and their families.

Article 20 on the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex

⁵ Conclusions XIV-2 (1998), Statement of Interpretation on Article 15.

⁶ ECSR (2020), Conclusions 2019, Press Briefing Elements, p. 3.

⁷ According to Article A of the 1961 Charter, each state party must accept so-called 'core articles' which are Articles 1, 5, 6, 12, 13, 16 and 19. In the corresponding provision of the Revised Charter the core articles are 1, 5, 6, 7, 12, 13, 16, 19 and 20.

Article 20 delineates four broad areas of intervention where equality needs to be achieved: access to employment, protection against dismissal; vocational guidance and training; working conditions, including remuneration; and career development, including promotion. In interpreting Article 20, the Committee also requires States Parties to take substantive and concrete positive measures to promote equality of opportunity for female workers and to eliminate structural inequalities.⁸ As part of this positive obligation, regarded as central to the requirements of Article 20, the Committee has concluded that national legislation prohibiting the adoption of positive action measures will be in breach of Article 20.⁹

Article 23 on the rights of older persons to social, legal and economic protection

Article 23 was the first such right in a human rights treaty. It is an elaborate article that deals with social services and benefits for elderly persons, infrastructure, and autonomy rights. This article is very broad and captures the rights of elderly persons in various domains, such as adequate resources, independence, adequate housing, health care and appropriate support while respecting their autonomy and privacy.

Article 27 on the right of workers with family responsibilities to equal opportunities and equal treatment

The purpose of this article is to prevent family obligations from restricting access to the labour market, exercise of an occupation and career advancement.¹⁰ In particular, courts or other competent bodies should have the mandate to order reinstatement of an employee unlawfully dismissed¹¹ and/or to award adequate compensation.¹²

These are, in broad strokes, the equality elements of the Charter. But what about their realisation in practice?

⁸ See e.g., Conclusions XVII-2, Greece, Article 1 of the Additional Protocol, pp. 338-341; Conclusions XVII-2, Netherlands (Antilles and Aruba), Article 1 of the Additional Protocol.

⁹ Conclusions XIII-5, Statement of Interpretation on Article 1 of the Additional Protocol.

¹⁰ ECSR, Conclusions 2003, Statement of Interpretation on Article 27§3.

¹¹ ECSR, Conclusions 2007, Finland.

¹² ECSR, Conclusions 2005, Estonia.

3. IMPLEMENTATION OF EQUALITY STANDARDS IN THE CHARTER

The Committee developed its interpretative approach to substantive equality in the course of time. One of the key principles of interpretation is the view that the Charter is a 'living instrument'. The Charter standards should be applied in present-day situations and be interpreted in view of actual or emerging human rights issues.¹³ Another related principle is the application of the Charter 'in law and practice'.¹⁴

Let me illustrate this with two cases:

a. Collective Complaint No. 109/2014, *Mental Disability Advocacy Centre (MDAC) v. Belgium*¹⁵

MDAC alleged that the Flemish Community of Belgium denies access to mainstream education to disabled children, in particular to children with intellectual disabilities and fails to provide the necessary assistance to ensure such inclusion, in violation of Articles 15, 17 and Article E.

Referring to previous case law, the Committee noted that Article 15 of the Charter does not leave States Parties a wide margin of appreciation when it comes to choosing the type of school in which they will promote independence, integration and participation of children with disabilities, this, in view of the Committee, must be a mainstream school.¹⁶ However, the percentage of disabled children attending special schools in the Flemish Community was high: 85% according to the complainant organisation and 75% according to the Government. The Committee also noted that according to MDAC, 1 000 children with disabilities were exempt from compulsory schooling and did not receive any education at all. The Government stated that a much smaller number of school aged children are unable to attend education because of their impairments and therefore had

¹³ See, e.g., ESCR, *Autism-Europe v. France*, Collective Complaints No. 13/2002, Decision of 4 November 2003; *Transgender Europe and ILGA-Europe v. The Czech Republic*, Collective Complaint No. 117/2015, Decision of 15 May 2018.

¹⁴ ESCR, *FEANTSA v. France*, Collective Complaint No. 39/2006, Decision of 5 December 2007.

¹⁵ Mental Disability Advocacy Centre (MDAC) has undergone a change in the name, and it is now called Validity Foundation.

¹⁶ ECSR, *Mental Disability Advocacy Centre (MDAC) v. Belgium*, Collective Complaint No. 109/2014, Decision on the merits of 29 March 2018, § 61.

received an exemption from compulsory schooling. However, the Committee found that the Government failed to support its statement by an objective and reasonable justification.¹⁷ Further, the Government provided no information as to how it planned to ensure the right to inclusive education for children with intellectual disabilities or those children who cannot follow the core curriculum due to their disability.¹⁸

Regarding a right to remedy against the refusal to admit children with disabilities to mainstream schools, the Committee noted that although a legal procedure is possible under the Anti-Discrimination Act, it is rarely used as parents are not aware that this remedy is open to them. The mere existence of a possible remedy does not suffice when it is not used in practice, as this would not be an “effective” remedy.¹⁹

b. UWE Decisions

The Committee took recent decisions in a range of equal pay complaints initiated in 2016 by the NGO ‘University Women Europe’ (hereafter ‘UWE’) against all European countries that have accepted the collective complaints procedure. In Complaints No. 124-138/2016, *University Women Europe (UWE) v. Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden*,²⁰ UWE alleged that the gender pay gap and the under-representation of women in decision-making positions within private companies had not been effectively reduced/eliminated in all countries. These cases allowed the Committee to further develop its gender equality jurisprudence, and apply it to a range of different national situations.

Thus, on the equal pay issue, the Committee assessed the scope of the positive obligations of State Parties, these obligations include:

- recognition in legislation of the right to equal pay for equal work or work of equal value;
- ensuring access to effective remedies when the right to equal pay has not been guaranteed;

¹⁷ *Ibid.*, § 68.

¹⁸ *Ibid.*, § 76.

¹⁹ *Ibid.*, § 85.

²⁰ Decisions on the merits of 5 and 6 December 2019.

- ensuring pay transparency and enabling job comparisons;
- maintaining effective equality bodies and other relevant institutions;
- collection of reliable and standardised data with a view to measuring the gender pay gap;
- adoption of measures to promote equal opportunities through gender mainstreaming and the periodic review of promotion and recruitment mechanisms.²¹

Regarding the under-representation of women in decision-making positions on private company boards, the Committee considered that the Charter imposes positive obligations on states to tackle vertical segregation in the labour market, by means of, inter alia, promoting the advancement of women in decision-making positions in private companies. Measures designed to promote equal opportunities must include the promotion of effective parity in the representation of women and men in decision-making positions in both the public and private sectors.²²

14 out of the 15 states involved in the litigation were found to be in violation of the right to equal pay and/or the right to equal opportunities in the workplace.²³ Although the Committee noted various positive developments, such as measures taken by some states in recent years to reduce the gender pay gap, progress was still slow. The Committee concluded that inadequate action in these countries had been taken to address persistent structural inequalities in the form of segregation in the labour market, lack of pay transparency, obstacles to access effective remedies and retaliatory dismissals.

4. CONCLUSIONS

Europe still faces a huge implementation gap regarding equality and social rights. Large disparities in social rights protection remain among and within European countries. Discrimination of marginalized groups is prevalent in all states. While there is progress in terms of legislation, *de facto* inequalities regarding specific groups continue to exist. This has been confirmed by the Committee's

²¹ Complaint No. 124, *University Women Europe (UWE) v. Belgium*, para. 115.

²² Complaint No. 138, *University Women Europe (UWE) v. Sweden*, para. 204.

²³ See also Council of Europe (2020), UWE Decisions Factsheet.

conclusions of 2020, where discrimination based on gender, ethnicity, disability and sexual orientation persists.

The Charter framework recognises the close and necessary link between social rights protection and equality, as reflected in provisions like Article 20 on gender equality in employment. The interpretation given by the Committee to these provisions is based upon a broad adherence to ‘substantive equality’. It has also affirmed that equality must be an integral part of a general framework of social rights protection.

The Committee’s jurisprudence also recognises the key role that positive state action plays in ensuring equal enjoyment of core social entitlements. Non-discrimination is not just conceptualised in negative terms: instead, the Committee affirms that State Parties must take positive steps to achieve equal pay, equal access to key social security benefits and health care entitlements, and equal enjoyment of core labour rights. Its decisions in the *UWE* complaints are particularly important in this regard, highlighting the necessity for states to actively promote equal pay and gender equality in private sector decision-making positions.

The COVID-19 situation underlines even more the need to tackle inequalities that are on the rise. This year, in 2021, the Committee has published a statement on COVID-19 and social rights²⁴ which can be used as a human rights roadmap for the tough decisions that lie ahead for states and will hopefully support the implementation of social rights for all.

²⁴ European Committee of Social Rights Statement on COVID-19 and social rights, adopted on 24 March 2021.