



# THE PERSONAL SCOPE OF THE EUROPEAN SOCIAL CHARTER: QUESTIONING EQUALITY

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SUMMARY: I. *CHARTA LOCUTA CAUSA FINITA?* II. THE EXCLUSIONS SET FORTH IN THE CHARTER... III. ...AND SOME DOCTRINAL ATTEMPTS TO BYPASS THEM. IV. THE (QUASI-)JUDICIAL ACTIVISM OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS. V. FINAL REMARKS.

## **Key words**

*European Social Charter; Personal scope; Immigrants; Unlawful residence; Workers' minority; European Committee of Social Rights; Human dignity; Multilevel protection; Dynamic interpretation.*

## **Abstract**

*The European Social Charter, adopted by the Member States of the Council of Europe in 1961 and revised in 1996, is devoted to implement at European level the values and purposes underpinning the 1948 U.N. Universal Declaration of Human Rights. As a complement of the 1950 European Convention on Human Rights, it also epitomizes the principle of the "indivisibility" of human rights. These aspirations, however, risk to be frustrated by the Charter personal scope's limitations provided for in its Appendix. Through an in-depth critical analysis, the paper aims at disputing these restrictions as still justified, also in the light of the more flexible approach followed within the collective complaints procedure by the "Charter's guardian", the European Committee of Social Rights. Indeed, this quasi-judicial body has reasonably extended several Charter provisions to persons strictly excluded from its protection. In the enduring lack of new formal revisions, only widespread acceptance and effective implementation of Committee's "jurisprudence" in Member States legal systems will be able to avoid the risk of an increasing marginalization of the Charter in the European multilevel constitutionalism.*

## **I. *CHARTA LOCUTA CAUSA FINITA?***

The *European Social Charter* (ESC), adopted by the Member States of the Council of Europe (CoE) in 1961 and revised in 1996 (ESCr), was intended to implement at

European level the 1948 *Universal Declaration of Human Rights*, functioning also as a complement of the 1950 *European Convention on Human Rights* (ECHR). These two sister Charters of the CoE system, together with the EU Charter of Fundamental Rights, synthesize the “European” understanding of human rights topic. Indeed a pluralistic, rather than a monistic, understanding: a view that, not denying the possibility of conflicts between rights, has interiorized the need for harmonizing interpretations.

The sister Charters travel together, but at different speeds with regard to their effective implementation in national legal systems. This depends in part on the distinct nature of the rights protected (and on what they symbolized at the time of adoption) and in part on the dissimilar guarantees provided therein<sup>1</sup>; but, to some extent, it is also due to a “cultural” preference for the ECHR system, a kind of «conventional obsession» (*obsesión convencional*) as pointed out by L. Jimena Quesada<sup>2</sup>.

One of the most relevant differences between ECHR and ESC concerns their personal scope. Though generally underestimated among scholars, this is a key point for the implementation of the two Charters at national level.

The difference is first of all stylistic: while the ECHR states *from the incipit* (art. 1) that

«The High Contracting Parties will secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention»,

the first paragraph of the Appendix attached *at the end* of ESC specifies in very clear terms that

«Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners *only in so far as they are nationals of other Parties lawfully resident or working regularly* within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.

This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties».

Given this wording, one may conclude: *Charta locuta causa finita!*

On the contrary, in my view, the matter is far from being dealt with, for several reasons.

<sup>1</sup> The conformity of Member States action with the ECHR is controlled by the *European Court of Human Rights* (ECtHR) on the ground of individual applications, while compliance with the ESC is assessed by the *European Committee of Social Rights* (ECSR) through a monitoring activity on national reports and decisions on collective complaints.

<sup>2</sup> See JIMENA QUESADA 2013, at 58.

First of all, being a human rights treaty (moreover, a “European” treaty)<sup>3</sup> and concerning basic needs and primary goods of the person *as such*, the Charter shares the openness to universalism peculiar of all similar declarations. The “indivisibility” and “interdependence” of human rights, to which ECSR often refers, would mean very little if not accompanied by the acknowledgement of their “universality” and – I would also add – “intergenerationality”, as theoretical preconditions for an effective protection<sup>4</sup>.

Secondly, the context in which the Charter operates – a set of overlapping and interrelated legal systems on the same geographical area: Council of Europe, European Union, Member States – offers many opportunities to extend equivalent or wider rights to individuals falling outside the personal scope of the ESC (at least to lawful residents).

The third and final reason is more political and forward-looking: today’s Europe is facing, much more than in the past, increasing waves of internal and external migrations. The 1996 revision was a good chance to update the Charter to this regard, but it didn’t happen. Now, since no turnabout is visible on the horizon, the mentioned restrictions in terms of persons protected could drive the ESC into a grey-zone, which means a progressive marginalization of its impact on the daily lives of people moving across and establishing in the European territory.

The paper initially addresses the different exclusions set forth in the Charter and their plausible reasons, aiming at verifying if these last are still valid today. Some academic attempts to bypass the Appendix restrictions will be analysed in a second step. However, the central part of the writing will focus on ECSR perspective on the subject, from which arises the key role of the collective complaints procedure (CPP) in forwarding a dynamic, updated reading of the Charter as a «living instrument». Some final remarks will outline the main issues at stake in the author’s view.

<sup>3</sup> This feature has significant effects on the construction of Charter provisions: the Committee usually takes in account ECHR articles and EU law relevant for the case; furthermore, it is often willing to refer to Strasbourg and Luxemburg Courts jurisprudence to strengthen its findings (for major details, see BRILLAT 2013, 17 ff.). This stance is fully consistent with ECSR preference for a teleological approach and a systematic reading of the Charter, in the light of all other relevant international norms and standards, always seeking to give «full life and meaning» to the rights enshrined therein.

<sup>4</sup> «All human rights are universal, indivisible and interdependent and interrelated», solemnly affirms the *Vienna Declaration* (Part I, no. 5), adopted in 1993 by the U.N. World Conference on Human Rights. On the “intergenerational” feature of fundamental rights, see amongst others SPADARO 2008, 88 ff. and BIFULCO 2008; for an overall perspective, instead, BIFULCO, D’ALOIA (eds.) 2008. The topic is also strictly related to the concept of “common goods”: see lastly BAILEY, FARRELL, MATTEI (eds.) 2014.

## II. THE EXCLUSIONS SET FORTH IN THE CHARTER...

A thorough analysis of the text shatters the misleading impression that the Charter addresses exclusively labour issues or protects workers' rights only: almost half of its provisions (15 out of 31 in Part I) refers generally to «everyone/anyone»<sup>5</sup>, «all persons»<sup>6</sup>, «nationals»<sup>7</sup>.

Yet, the rule embodied in the Appendix hangs over *all* Charter's articles, so that they may apply to foreigners «only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned» (§1). However, according to the subsequent paragraphs, Member States also undertake to grant refugees and stateless persons in lawful conditions a treatment at least «not less favourable», in compliance with the respective U.N. Conventions<sup>8</sup>.

To sum up, under the Charter each Member State has an obligation to assure the enjoyment of the rights protected to

- its own citizens;
- other Parties' nationals lawfully resident in its territory;
- other Parties' nationals regularly working in its territory;
- refugees and stateless persons legally resident in its territory, as far as protected by the relative international treaties.

On the contrary, Charter provisions should not apply to: *a) third-State* nationals; *b) other Parties' nationals unlawfully present* in the State territory; *c) refugees and stateless*

<sup>5</sup> See the ESCr provisions regarding: the right to earn a living «in an occupation freely entered upon» (no. 1), the right to «appropriate facilities» for vocational guidance (no. 9) and vocational training (no. 10), the right to health (no. 11) and to social and medical assistance (no. 13), the right to benefit from qualified «social welfare services» (no. 14), the right to «protection against poverty and social exclusion» (no. 30), the right to housing (no. 31).

<sup>6</sup> It is the case of the right to special protection of children or young persons (no. 7 and 17), the right to independence and social integration and participation of disabled persons (no. 15), the right to protection of the elderly (no. 23) and, to some extent, the right to appropriate protection and to «full development» of the family (no. 16 and 27).

<sup>7</sup> As for citizens of a Party undertaking a gainful occupation in the territory of another Party (no. 18).

<sup>8</sup> «2. Each Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January 1967, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said Convention and under any other existing international instruments applicable to those refugees.

3. Each Party will grant to stateless persons as defined in the Convention on the Status of Stateless Persons done in New York on 28 September 1954 and lawfully staying in its territory, treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable to those stateless persons» (paragraph added by the 1988 Amending Protocol).

persons *not* complying with the above conditions. Moreover, a fourth exclusion originates indirectly from the letter of art. I§2 of the ESCr (correspondent to the art. 33 of the ESC), by which States compliance with several undertakings of the Charters «shall be regarded as effective if the provisions are applied [...] to the great majority of the workers concerned»<sup>9</sup>. Consequently, *workers' minority* may fall out of the Charter protection.

The mentioned exclusions appear *differentiated* (as to the persons affected) and *selective* (as to the provisions concerned). It is thus tentative to offer a unique justification for this “anomaly” among international human rights texts<sup>10</sup>. Indeed, many reasons seem to have concurred to this result.

Regarding third-State nationals, for examples, it is likely that the signing Countries were unwilling to engage themselves in granting with welfare benefits foreigners whose States were not bound by mutual obligations. The fear of an uncontrolled increase of public expenditure has probably pushed the Parties to limit their undertakings with a sort of “reciprocity clause”.

As for the second and third exclusions (foreigners, refugees and stateless persons in unlawful stay), it is a matter of fact that the Charter originally aimed at pursuing a common social protection standard in how Member States were to treat their *own* citizens, primarily in labour context. The few exceptions provided for in arts. 12§4, 13§4, 18 and 19 confirm the idea of a limited mobility inside the borders of 1960s Europe, justified more by the search of long-term jobs than by some “welfare tourism” trend<sup>11</sup>. National communities thus appeared to the ESC framers somewhat *static*. Social protection of foreigners was deemed to be a matter of real importance only in so far they had established a deep and durable linkage within that territory, as proved by the use in the Appendix of the terms «lawfully resident» and «working regularly». It is also worthwhile reminding

<sup>9</sup> The concerned provisions refer to the following rights: just conditions of work (art. 2, except §6), protection of children and young persons (art. 7§4-6-7), vocational training (art. 10, except §4), workers' information, consultation and participation (arts. 21 and 22).

<sup>10</sup> See, for all, the 1966 U.N. *Covenant on economic, social and cultural rights*, whose articles refer generally to «everyone» (esp. in Part III). The same ECSR has emphasised the aforesaid “anomaly” in its *Conclusions 2011*, at 16. However, the main incongruity regards basically “lawfully resident” foreigners, whereas international norms are usually less sensitive towards the protection of “irregular” migrants: see PALMISANO 2013, at 49 and, more extensively, Id. 2009, 509 ff. As to EU law, there have been filed up to 20 different legal status regarding third-State nationals, on the ground of the length of residence permits or of the specific legal protection claimed: for a synthetic overview, see the *Handbook on European Law Relating to Asylum, Borders and Immigration*, Luxemburg 2014, at 14 (table 1), issued by the EU Fundamental Rights Agency and the Council of Europe; for a deeper (though less recent) insight, see instead GUILD 2004, 3 ff.

<sup>11</sup> The cited exceptions regard, respectively, the equal treatment clauses between citizens and other Parties' nationals in social security rights (art. 12§4) or in social and medical assistance (art. 13§4), the freedom of Party's nationals to engage in a gainful occupation in the territory of another Party (art. 18), the protection of migrant workers and their families (art. 19).



that since its origin the principle of non-discrimination among Member States' nationals has represented a milestone in European Community Law and the ground for the establishment of a common market<sup>12</sup>.

The last exclusion (workers' minority) resembles a sort of "safeguard clause" to be relied on by Member States in case of alleged failure to comply with Charter obligations within the reporting procedure. In the subjects concerned, the enjoyment of the rights at stake by «the great majority of the workers concerned» is esteemed a satisfying achievement, although the left part (don't know really how much little) could be simply ignored. The choice may appear consistent with a realistic approach to the matter, and it was probably required to meet the largest consensus within the signing Parties on the concerned articles. Nonetheless, this restriction goes far beyond the "progressiveness" principle that characterizes the implementation of many social rights<sup>13</sup>, underpinning the quite different idea of a *partial* (rather than universal) enjoyment of these rights. Furthermore, due to the vagueness of the phrase, the use of State's margin of appreciation in the case may easily result in a breach of ESC equality principle (art. E)<sup>14</sup>, *generating a paradoxical, quite absurd, "discriminations' legalization"*.

Given these reasons as plausible in 1961, I do believe they have substantially weakened in 2014.

The first three exclusions, letting aside the ambiguities arising within the CoE legal system, appear in contrast with international, EU and national law developments of the last decades. For instance, under the ILO Convention no. 143/1975, a migrant worker in *irregular* position shall «enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other

<sup>12</sup> See art. 48§2 of EEC Treaty, progressively implemented during the Sixties by several legislative acts such as regulations no. 38/64/CEE and 1612/68/CEE, or directives no. 64/221/CEE, 64/240/CEE and 68/360/CEE.

<sup>13</sup> For examples, art. 2§1 of the 1966 *Covenant on economic, social and cultural rights* requires that each Party take adequate steps «with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means», devoting to this end «the maximum of its available resources». Progressiveness, gradual implementation, budget constraints: these are all rhetoric arguments to which courts usually refers, as well as the ECSR does. For instance, in deciding the complaint no. 58/2009 (major details in the next paragraph, *sub b*), the Committee has stated that «[the] realization of the fundamental social rights recognized by the Revised Charter is guided by the principle of progressiveness, which is explicitly established in the Preamble and more specifically in the aims to facilitate the "economic and social progress" of State Parties and to secure to their populations "the social rights specified therein in order to improve their standard of living and their social well-being"» (§27).

<sup>14</sup> «The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status».

benefits» (art. 9§1)<sup>15</sup>. As to the EU law, not only is provided equal treatment between all regular workers, third-States nationals included; but, by virtue of a dynamic interpretation of EU citizenship, the European Court of Justice (ECJ) has also extended in some cases the right to residence (with subsequent social entitlements) to even inactive third-Countries nationals<sup>16</sup>. Finally, national States often grant with basic social rights (health care, education, shelter and the like) even unlawfully resident foreigners.

The workers' minority exclusion, as yet noted, appears rather questionable if compared to the developments of "equality principle" in contemporary constitutional States.

Notwithstanding these facts, the frame described in the Appendix remains for the Charter system the law *in force*. But, it is time to ask, does that correspond also to the law *in action*?

### III. ...AND SOME DOCTRINAL ATTEMPTS TO BYPASS THEM

Before addressing the question, it is worth verifying the existence of other theoretical alternatives to a formal amendment of the Appendix, which appears today harder than it was in the mid-1990s (when the Charter was revised), due also to the austerity measures generally adopted by States to tackle the current economic global crisis.

A first possibility relies on the sub-paragraph of the same Appendix, which allows the Parties to extend «similar facilities to other persons». On this ground, for example, the ECSR has held that

«Whereas these obligations do not in principle fall within the ambit of its supervisory functions, the Committee does not exclude that the implementation of certain provisions of the Charter could in certain specific situations require complete equality of treatment between nationals and foreigners, whether or not they are nationals of member States, Party to the Charter»<sup>17</sup>.

This is a very important statement, because it places the whole matter under the correct light, that is under the pervasive influence of the "equality" principle. Unfortunately, this acknowledgment cannot go further than the «certain *specific* situations» conceived by the Committee<sup>18</sup>. In any case, the even more favourable national legislations might not mechanically widen Charter obligations, nor broaden ECSR jurisdiction.

<sup>15</sup> See also Part III of the *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, adopted by the U.N. General Assembly on December 18<sup>th</sup>, 1990 (resolution no. 45/158).

<sup>16</sup> It is the case of the ascendants of EU minor children citizens: see for all ECJ (GC), judgment of 8 March 2001, *Ruiz Zambrano* (C-34/09).

<sup>17</sup> ECSR, *Conclusions 2004, Statement of interpretation*, at 10.

<sup>18</sup> In this sense, see also AKANDJI-KOMBE 2010a, at 83 f.



In the Committee's view, the «similar facilities» freely extended by each Member State to «other persons» seems indeed to represent a strengthening for an autonomous dynamic interpretation of the rights enshrined in the Charter (*argumentum a fortiori*), rather than the basis for such interpretation (*ratio interpretandi*). As the next paragraph will show, the «specific situations» that claimed for an extensive reading of Charter rights did occur, thanks to the CCP.

A second alternative to a formal revision of the Appendix would be to replicate for the ECSR the same scheme that allowed the ECtHR to extend its jurisdiction under the non-discrimination principle (art. 14 ECHR) upon the rights additionally granted by the legislation of each Party<sup>19</sup>. Resting once again on the potential of the cited sub-paragraph, the Committee thus could enlarge its control upon national discriminatory treatments affecting foreigners even outside Charter's domain. Such hypothesis is quite fascinating but, theoretical ambiguities apart<sup>20</sup>, it comes at odds with what the *Explanatory Report* to the ESCr clearly affirms on the point: namely, that art. E «must not be interpreted so as to extend the scope *ratione personae* of the revised Charter which is defined in the appendix to the instrument» (no. 137).

In short: no exception deriving from legal sources *other* than the Charter seems admissible on the subject.

A third possibility relies on Member States' willingness, duly expressed by unilateral declarations, to respect the Charter even beyond its personal scope. However, though encouraged by the Committee itself<sup>21</sup>, the initiative has not yet given the expected results, having been even formally rejected by Lithuania and the Netherlands. According to a ECSR member, the major difficulty probably lies in the wideness (and vagueness) of the proposed formula, which does not cover only foreigners lawfully resident in the territory of a Party but «every individual under its jurisdiction»<sup>22</sup>.

Aside from these overarching attempts, other interpretative routes have been drawn with regard to narrower contexts. Most interesting, the one based on that part of the Appendix where it is specified that the extension of Charter provisions to foreigners

<sup>19</sup> See art. 1 of the 1998 Protocol no. 12 to the ECHR: «1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1».

<sup>20</sup> It is worth stressing that, while the ECtHR jurisdiction was enlarged *ratione materiae*, the ECSR control would be expanded *ratione personae*: this passage needs indeed to be adequately justified.

<sup>21</sup> The idea was initially launched by ESC *Executive Secretary* (BRILLAT 2010, at 55) and then sponsored by the ECSR, which prepared also a model for the declaration: see *Conclusions 2011, Personal Scope of the Charter*, at 16 f.

<sup>22</sup> See PALMISANO 2013, at 48.



(within the limits described) is «subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19». These last articles, if read in conjunction with the correspondent rights of Part I (which indeed do not refer to any lawful stay requirements), would create an implicit obligation for each State to prevent other Parties' nationals from the risk of *becoming irregulars*, by reserving them a more favourable treatment than that usually provided for in immigration laws<sup>23</sup>.

#### IV. THE (QUASI-)JUDICIAL ACTIVISM OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Besides the manifold theoretical attempts described, it is the “voice” of the Charter’s guardian that can really make the difference.

Indeed, during the last decade, there have been several official statements on the personal scope of the Charter, including the request for formal revisions of the Appendix or for States’ unilateral undertakings. For its incisive tone, it is worth quoting an excerpt of the *Conclusions 2011*<sup>24</sup>:

«Such a limitation is hardly consistent with the nature of the Charter, intended as a human rights instrument, and it is also a sort of anomaly: one does not find the same kind of limitation in other international legal instruments aimed at protecting human rights in general, or social rights in particular.

Moreover, the limitation of the personal scope provided for in the Appendix appears to be questionable in the light of the meaning and value that States Parties to the Charter attach to the dignity and fundamental rights of any human being as such, regardless of her/his nationality. Indeed, States Parties seem already inclined, and conscious of their duty, to apply social rights beyond the limited personal scope indicated in the Appendix.

In addition, important social changes, which have occurred since the text of the Charter was adopted, make it increasingly urgent to overcome the limitation of the personal scope prescribed by the Appendix, in order to render the Charter system fully consistent with the object and purpose of European and international standards of human rights protection. One example of these changes is the growth of migration flows over the last two decades, as a result of which many European States have become destination countries for large numbers of immigrants from Africa, Asia, and Latin America. The fact that under the Charter system only nationals of the States Parties can invoke and obtain respect for their social rights, turns out to be a *substantial discrimination*, making the Charter system at odds with the *universal nature of human rights*, and with the fundamental values underpinning the Charter» (emphasis added).

The passage sounds as a frank acknowledgement of Charter’s backwardness, though it remains at a level of principle (but it couldn’t be otherwise, given that context). More

<sup>23</sup> For this thesis see, in more details, AKANDJI-KOMBÉ 2010a, 87-91.

<sup>24</sup> ECSR, *Conclusions 2011, Personal Scope of the Charter*, at 16 f.

practical consequences, in a *quasi-judicial* perspective, come instead from the CCP field, where specific and detailed violations of the rights at stake are challenged.

For the purpose of this analysis, the relevant decisions will be clustered in three different groups however sharing a common set of interpretative standards and principled arguments. The first one addresses directly the issue of “unlawful” stay, regardless of national membership, which is instead the topic of the second one. The third and last groups deal with the “workers’ majority” clause.

(a) *Unlawful residence, basic needs and human dignity*

Three relevant decisions come within this first vein: *International Federation of Human Rights Leagues (FIDH) v. France*<sup>25</sup>, *Defence for Children International (DCI) v. the Netherlands*<sup>26</sup> and *Defence for Children International (DCI) v. Belgium*<sup>27</sup>. The mainstream is laid down by the FIDH case (concerning State’s obligation to grant medical assistance also to irregular foreign minors), whose principled reasoning is in fact implemented and enhanced by the other two decisions.

The major premise encompasses a set of general assumptions relating to the Charter as a whole, and thus also to its Appendix. In short: *i*) the ESC must be interpreted, according to the 1969 Vienna *Convention on the Law of Treaties*, «in the light of its object and purpose»; *ii*) the ESC’s purpose is to protect human rights, which are all «universal, indivisible, interdependent and interrelated» (1993 Vienna Declaration); *iii*) the Charter is a complement of the ECHR and foremost a value-oriented «living instrument», devoted to human dignity, autonomy, equality and solidarity; *iv*) its provisions must be read as to give *full life and meaning* to the rights embodied therein, «i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter» (§§26-29).

On these grounds, the ECSR draws a precise conclusion:

«the restriction in the Appendix ought to be read given the primary purpose of the Charter as defined above. The restriction attaches to a wide variety of social rights in Articles 1-17 and impacts on them differently. In the circumstances of this particular case, it trends on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being [...] Human dignity is the fundamental value and indeed the core of positive European human rights law [...] and health care is a prerequisite for the preservation of human dignity. The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter» (§§30-31).

<sup>25</sup> Complaint no. 13/2003, decision on the merits of 8 September 2004.

<sup>26</sup> Complaint no. 47/2008, decision on the merits of 20 October 2009.

<sup>27</sup> Complaint no. 69/2011, decision on the merits of 23 October 2012.

Thus, it can be clearly affirmed that the persons falling outside the Appendix *are not completely excluded* from the entitlements provided for in the Charter, especially if an “essential need of the person” is at stake and human dignity is affected, as happened in the FIDH case<sup>28</sup>.

The second complaint, *DCI v. the Netherlands*, focuses on minors’ protection as well (art. 17), but this time under the right to housing embodied in art. 31. Emphasising the connection between this latter and human dignity, the complainant ONG wishes to obtain a decision drawing from the (alleged) same premises of the FIDH case the (expected) same consequences (§19).

The Committee actually finds a partial infringement of art. 31, but limited to the right to “immediate shelter” (under States’ undertakings in preventing, reducing and gradually eliminating homelessness) and *not even* in respect to the right to “adequate housing”. It means that only the former should be deemed «closely connected to the right to life» and also «crucial for the respect of every person’s human dignity», while the latter should not exceed the perimeter of ESC personal scope, even though vulnerable persons might be adversely affected (as for the foreign irregular minors of the instant case: §§42-48 and §§63-71).

Aside from the merits, it is noteworthy what the respondent Government has argued in reply to complainant’s submissions. The Netherland observes that immigration policy (who may legally enter and reside in the territory) is a State’s own responsibility, whereas the obligation of granting irregular immigrants with housing or other social entitlements would likely boost illegality and thus «frustrate the right of the State to control immigration» (§31 and §54)<sup>29</sup>.

The objection goes straightforward to the core of the matter. Actually, under this argument lies the fear that a *judicial* extension of Charter guarantees, beyond any formal and politically agreed revision process, might threaten the remaining spheres of sovereignty national States still own, as in the case of immigration policies. The suspicion seems not totally unfounded, so the point is: can it be reconciled with the universal nature of human rights and the correspondent expansive force of the international norms protecting them (ESC included)?

<sup>28</sup> The Committee found a violation of art. 17 (right of children and young persons to social, legal and economic protection), as to the risk for foreign *minors* to be deprived of medical assistance during their stay, but it did not as well declare the infringement of art. 13 (right to social and medical assistance) with regard to illegally resident *adults*. However, the decision was not unanimous, as attested by the four dissenting opinions attached to it, half of which rejecting the majoritarian reading of the Appendix (and so excluding that art. 17 could apply to irregular foreigners at all) and the other half holding that also art. 13 was violated.

<sup>29</sup> The complainant ONG replied that children are usually not accountable of illegal entry or residence (the decision is taken mostly by their parents), while it would have been on State account to grant the protection they needed as vulnerable and less autonomous persons (§§32-33).



As a matter of principle, the Committee appeals to the need for reasonable balancing between State's interest in contrasting illegal immigration and fundamental rights' protection, referring also to ECtHR jurisprudence (§42)<sup>30</sup>. Nonetheless, in practise, the ECSR still carries on a restrictive construction of the Appendix. Recalling its prior assessments on the Charter as a «living instrument» serving fundamental European legal values, on the preference for a teleological approach and on the need for a reading consistent with other international human rights treaties (§§34-36), the Committee makes a new crucial statement. Even though affecting various rights and doing so in different ways, the restrictions provided for in the Appendix

«should not end up having unreasonably detrimental effects where the protection of *vulnerable groups* of persons is at stake» (§37, emphasis added).

The step forward is remarkable: while the prior decision turned around the fundamental rights and the basic needs of person (FIDH case, §30), now the reasoning *shifts from the "individual" and his rights to the "group" and its vulnerability*.

This represents in every respect a second valid ground for a *de facto* "disapplication" of the Appendix, even though less manifest, as again related to the protection of foreign unaccompanied minors now taken into account as a group and not *uti singuli*.

There is room enough to seriously question the utility, and the suitability, of upholding the Appendix as it is today. Given this trend, with the last and more recent case (*DCI v. Belgium*, decided in 2012) the Committee has taken the opportunity to sharpen its reasoning.

The complainant's line of attack is still the same, namely the status of foreign irregular minors, but now framed in a *wider* context of rights and guarantees such as: special protection against physical and moral dangers (art. 7§10), protection of health (art. 11), social and medical assistance (art. 13), social, legal and economic protection of family (art. 16) and of minor children and young persons (art. 17), protection against poverty and social exclusion (art. 30); all of them read alone or in conjunction with the non-discrimination principle (art. E).

It is thus apparent and concrete the chance for the Committee to make the little crack opened in the wall of the personal scope of the Charter became a large breach, though

<sup>30</sup> «Like the Court, the Committee however highlights that States' interest in foiling attempts to circumvent immigration rules must not deprive foreign minors, especially if unaccompanied, of the protection their status warrants. The protection of fundamental rights and the constraints imposed by a State's immigration policy must therefore be reconciled (see *mutatis mutandis* European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, judgment of 12 October 2006 § 81)».

which the rule embodied in the Appendix can be in fact overpassed. The complainant ONGs show to be perfectly aware of this.

In addition, this last complaint affects many, rather exclusive, State policies (childhood, family, poverty and the like), whose concrete features express the ripeness of a democracy and the strength of community ties. This kind of choices implies also, in each complex society, a permanent process of clarification and adjustment of the appropriate meaning of political key concepts such as “community”, “identity”, “foreigner” and “participation”, to enlist some. It appears then logical that national Governments, and prior the political parties running for elections, wish to keep upon these issues as larger a control and autonomy as possible. Logical but unrealistic, once it is acknowledged that the adoption of such policies must be aligned with a set of at least European, but very often international, legal bindings (as, in the studied cases, the 1989 U.N. *Convention on the rights of the child*)<sup>31</sup>.

Getting back to the complaint, and left aside the findings on the merits of the alleged violations<sup>32</sup>, we can focus on the part of the decision referring to the personal scope of the Charter, where new important statements are laid down.

*First.* When interpreting the Charter in the light of other relevant international rules, prior and foremost consideration must be given to «the peremptory norms of general international law (*jus cogens*), which take precedence over all other international norms and from which no derogation is permitted (Vienna Convention on the Law of Treaties, 23 May 1969, Article 53)» (§29). The rights to life and to physical integrity undoubtedly fall within these norms (§33).

*Second.* The application of Charter provisions beyond the limits of the Appendix is and have to remain «entirely exceptional», i.e. justified by «serious threats» of detrimental effects on fundamental rights of the persons concerned (as the right to life, to physical and moral integrity, to health) (§§35-36).

The two points are notable, signifying that the Committee is conscious of the ambivalent implications deriving from the new trend adopted and, hence, aware of the need to anchor its interpretative dynamism to more solid textual and normative grounds.

<sup>31</sup> As to the EU law, it is well known that many legislative acts have led during the years to a territorial dismantling and reconstruction on new grounds of Member States' welfare systems, in a direction more consistent with the fundamental freedom of movement: for major details see, among others, FERRERA 2005, 205 ff. and GIUBBONI 2012.

<sup>32</sup> The Committee stated that, as to the treatment of the minors concerned, Belgium infringed art. 17 (protection of children: §§68-83), art. 7§10 (minors protection against exploitation: §§84-86), art. 11 (access to health system: §§99-102), art. 13 (medical assistance: §§119-122) and art. 16 (decent housing for families: §§133-136), but not even art. 30 (contrast to poverty and social exclusion: §§143-147). For an in-depth analysis, see PALMISANO 2013, 51 ff.

(b) *Citizenship and data collection*

The second group of cases concerns the issue of citizenship and of vulnerable minorities' potential discrimination.

In 2004, the *European Roma Rights Centre (ERRC)* lodged a complaint against Italy for the violation of arts. 31 and E, as to the legislative enactments on Roma camping sites, a very weak point of Italian social and housing policies of the last decades<sup>33</sup>.

Most interesting, within a steady interpretative trend against the discriminations of vulnerable groups<sup>34</sup>, is the Committee's reply to the main defensive argument claimed by the Italian Government. This latter contended that the majority of Roma people fell out of the personal scope of the Charter (being third-State nationals or anyway unlawful residents) and, however, that it was impossible to distinguish within Roma total population those who met the requirements fixed in the Appendix from those who didn't (§15).

The answer sounds unexceptionable and unmistakable:

«Even assuming that, as the Government contends, it is impossible to distinguish among Roma to whom the protection afforded by Article 31 shall be compulsorily guaranteed and those Roma to whom, according to the Appendix (paragraph 1), the guarantee of such protection remains within the remit of States parties, the Committee does not see how such a circumstance would exempt the State from the obligation of ensuring that protection» (§18).

Moreover, when impacting adversely on vulnerable groups (as Roma minorities), differential legal treatments are deemed *suspect* and burden State authorities with the responsibility for collecting and updating data on the problem (a prior step for a «formulation of rational policy»), but also with the incumbency of proving that all adequate and possible measures have been already taken against the risk of discrimination (§§23-24).

It can be thus stated that, in reviewing State's margin of appreciation, the Committee has opened a new leak in the Appendix: whereas it is impossible to distinguish among individuals within the same group, there should be followed the interpretation more favourable to the person (*favor personae*), in such a way to apply rather than deny Charter's guarantees<sup>35</sup>.

<sup>33</sup> Complaint no. 27/2004, decision on the merits of 7 December 2005.

<sup>34</sup> See on this issue: BELL 2010, 39 ff. and DE SCHUTTER 2010b, 49 ff. Regarding the treatment of the cited minorities according to Italian Law, see BONETTI, SIMONI and VITALI (eds.) 2011.

<sup>35</sup> On the merits, the Committee found a violation of art. 31 in conjunction with art. E, as to the right to adequate housing (structurally secure and health safe dwellings: §§35-37), to the protection against forced and unjust evictions (§§41-42) and to social housing for disadvantaged groups (§§45-46).

A firm restatement of these principles arises from the second, heavier, decision against Italy, delivered few years later on a complaint lodged by the *Centre of Housing Rights and Eviction (COHRE)*<sup>36</sup>.

The Committee has indeed found not only that Italian legislation (the 2006 “Pacts for security” and the 2008 “Nomad” state of emergency Decrees) had breached several Charter provisions<sup>37</sup>, but also that the status of the ethnic minorities concerned (Roma and Sinti) had even worsened since the prior assessment in 2005 (§77), to such a degree to undermine the fundamental values peremptorily shared by all Members States and whose respect is a precondition for participating to the Council of Europe system<sup>38</sup>.

As to its moral strength and persuasive impact on the public opinion, this last decision appears very close to the ECtHR judgments assessing “structural” infringements of the Convention, although the former does not share the same legal effects of the latter. Anyway, a clear message to ECSR’s audience has been sent, and Appendix’ restrictions seem to have little or no weight in it. No wonder if the fulcrum of the decision relies on the breach of the non-discrimination principle (art. E), to which the other provisions appealed offer concrete chances of implementation.

At last, the Committee reiterates that States’ difficulty in adopting targeted actions, due to «the lack of identification possibilities» within heterogeneous groups, should not result in «depriving persons fully protected by the Charter of their rights under it», nor lead to denying basic rights connected to life and dignity to those who fall out the definition of the Appendix (§§32-33).

(c) *Workers’ minority and State obligations*

The last set of cases refers to the «great majority of the workers concerned» clause. This is a rather vague quantity, customarily estimated around the 80%. However, even though tolerable in the reporting system, the possibility of depriving the residual minority (up to 20%) of Charter’s entitlements is hardly consistent with the purpose of the CCP. Indeed, this purpose would be wholly frustrated if the Committee, upon State’s

<sup>36</sup> Complaint no. 58/2009, decision on the merits of 25 June 2010. For a comment, see GUIGLIA 2011, 1 ff.

<sup>37</sup> These were arts. 16, 19 (§§1, 4c. and 8), 30 and 31.

<sup>38</sup> «Furthermore, the measures in question reveal a lack of respect of the essential values set forth by the European Social Charter (among others, human dignity and non discrimination) whose nature and intensity goes beyond ordinary breaches of the Charter. Moreover, these aggravated violations do not only affect individuals as victims or the relationship between these individuals and the respondent state: they challenge the community interest and the fundamental common standards shared by Council of Europe Member States (human rights, democracy and the rule of law). Consequently, the situation requires urgent attention from all Council of Europe Member States» (§78). Of similar tone, see also *COHRE v. France*, complaint no. 63/2010, decision on the merits of 28 June 2011, §54.



plea, should rely on that clause to reject the complaints lodged on behalf of workers' minorities<sup>39</sup>.

Two decisions clearly highlight this point: *Confédération Française de l'Encadrement CFE-CGC v. France*<sup>40</sup> and *STTK ry and Tehy ry v. Finland*<sup>41</sup>.

In the first case (reduction of working time to 35 hours per week: "Aubry II" Act), the Government argued that the specific provisions contested – those applying to managers only – covered just the 5% of the total workers so that, in the light of art. I, no breach of Charter obligations had occurred (§26). The Committee, on the contrary, held that the rule set forth in art. I could have not led to deliberately excluding «a large number of persons forming a specific category» from the scope of the Charter, thus finding that «the excessive length of weekly working time permitted» by the French legislation had violated art. 2§1 (§§38-41).

The reasoning is sharable on the merits, but it omits to explain the background of the proposed construction: indeed, from no single provision of the Charter it can be unequivocally inferred that the wording «great majority» requires a comparison between *groups* of workers and not, as it seems, to look at the *total amount* of them. No surprise, then, that some ECSR members decided to dissent.

Slightly different the second case (additional benefits for unhealthy and dangerous occupations), in which only a 10% of workers were at stake. This time, the respondent Government had not invoked the mentioned clause, and neither did the Committee in declaring the violation of art. 2§4 of the Charter (§27). According to some authors, this might be a signal that, at least in the CCP, the restriction in art. I can be simply ignored if no party formally appeals to it<sup>42</sup>. Should be confirmed by the Committee in the future, this hypothesis would represent a further enlargement of Charter edges.

## V. FINAL REMARKS

The introduction in 1995 of the CCP has gifted the Charter a *second life*, solemnly begun with the adoption of the revised version a year later<sup>43</sup>. Under the pressure of complainant ONGs, the Committee has enriched with new substantive contents the trends arisen from the reporting system, but has also sharpened its interpretative techniques. It

<sup>39</sup> See also AKANDJI-KOMBÉ 2010a, at 91.

<sup>40</sup> Complaint no. 9/2000, decision on the merits of 16 November 2001.

<sup>41</sup> Complaint no. 10/2000, decision on the merits of 17 October 2001.

<sup>42</sup> See again AKANDJI-KOMBÉ 2010a, at 92.

<sup>43</sup> See for all: DE SCHUTTER 2010a, 11 ff. and O'CONNOR 2010, 167 ff.

is as new fuel had been pumped into the engine of the so-called *European social democracy pact* (as the Charter has been well defined)<sup>44</sup>.

I cannot really say if the hypothetical introduction of also *individual* complaints (such as in the ECHR system) would record only positive effects on the Charter functioning<sup>45</sup>. For sure, endowing collective organizations with the right to apply to the Committee offers at least two desirable advantages: on the one hand, it allows a wider and incessant monitoring on national actions with regard to a large number of persons; on the other hand, it forces States to deal with the demand for social reforms rather than satisfying individual claims<sup>46</sup>.

Most of all, the CCP (*concrete* monitoring) matches perfectly with the reporting procedure (*abstract* monitoring): each mechanism, indeed, offers the chance for subsequent reviewing of State follow-ups in the other's context<sup>47</sup>. Under this mutually strengthening "double" control system, social rights may gain more effectiveness. To this end, also *national judges* could play a crucial role in enforcing Charter's contents, *especially through a direct use of Committee's "jurisprudence"*, still too much rare<sup>48</sup>.

Regarding the personal scope of the Charter, the case-study shows how often the CCP has casted a light on situations national reports would have probably passed under silence. The preference for a reading *magis ut valeant* of ESC provisions, even beyond Appendix' literal terms, allowed the Committee to avoid the paradox of setting aside the Charter just when its protection was needed most (as for foreign unaccompanied minors, or ethnic minorities like Roma and Sinti) or when the remedy provided for risked to become almost useless (it was the case of "workers' minority"). This dynamic approach, however, in any respect should be taken for granted, as clearly evinced by the large use in the Committee's reasoning of both "heavy" value-oriented arguments and relevant international norms.

<sup>44</sup> By the ECSR current President: see JIMENA QUESADA 2009, at 391.

<sup>45</sup> In 2007, the Parliamentary Assembly of the Council of Europe proposed to establish a working group on the subject (recommendation no. 1795 (2007), §11.5).

<sup>46</sup> According to BELL 2010, at 48, «the philosophy of collective complaints is not to provide an individual remedy, but rather to achieve broader social reform». Similarities between individual applications to the ECtHR and collective complaints lodged with the ECSR, though, do exist and practically shorten the distance between the two remedies: see AKANDJI-KOMBÉ 2010b, at 160-161.

<sup>47</sup> Sometimes, the decisions delivered in the CCP are recalled also in conclusions relating to States that have not yet accepted the complaint mechanism. On the interdependence of the reporting and collective complaints procedures, with several examples, see JIMENA QUESADA 2014b, 151-155.

<sup>48</sup> To this last respect, see in general JIMENA QUESADA 2013; for specific case-law in several European Countries, see instead: GUIGLIA 2011a, 19 ff. (Italy); AKANDJI-KOMBÉ 2012, 1014 ff. (France); SALCEDO BELTRÁN 2013, 119 ff. (Spain).

It is quite recurring, for examples, the appeal to universal enjoyment of “elementary” rights, i.e. those rights closely related to human dignity, real *Grundwert* of all the European multi-layered guarantees’ system<sup>49</sup>. Actually, the implicit distinction between more or less “important” rights must not be considered dogmatically: each and all the rights embodied in the Charter are fundamental and, together with those enshrined in the ECHR, form a basically unique “*bloc de constitutionnalité*”. That distinction serves rather as a means for testing States’ compliance with the obligations undertaken and also as a principled argument against any attempt to weaken the value of the Charter through a mere literal reading of its text.

Moreover, the Committee’s “essentialist” argument reflects a sort of hermeneutic pre-understanding (*Vorverständnis*, in J. Esser conceptualization) of human rights topic, all the most sharable in our concern. It relies on two pivotal assumptions: *a*) all fundamental rights, included social rights, pertain to the “human being” as such and not only to the “citizen”; consequently *b*) it is their restriction to citizens, rather than their extension to foreigners, that ought to be legally justified. Actually, this peculiar reversal of the accustomed opinion mirrors one of the most advanced and sophisticated patterns of the *equality principle*, defined as the «reasonableness of differentiations»<sup>50</sup>.

Quite oddly, in the case-law analysed the use of non-discrimination principle in traditional sense appears modest. Although constantly invoked by the complainants, the Committee did apply art. E only to discriminatory treatments of vulnerable *groups* (Roma and Sinti), preferring in the other cases to directly rely on Charter’s substantive rights (foreign minors, workers’ minority). This may sound consistent with the inherent logic of “collective” complaints, but in my view the Committee might as well capitalize that principle to its full potential even beyond groups’ range, for example by reading art. E as an *open clause*, i.e. considering not exhaustive the enlisted grounds on which discriminations are forbidden.

As yet noted, of course not all differentiations are actually *unlawful* discriminations. The Appendix again specifies: «A differential treatment based on an objective and reasonable justification shall not be deemed discriminatory»<sup>51</sup>. Furthermore, relying on ECtHR jurisprudence, the Committee has stressed that the very essence of the equality principle is *to treat equals equally and unequals unequally*: this means, for examples, that citizenship

<sup>49</sup> Aside from the mentioned case-law, see also the latest ECSR *Activity Report 2013, Statement of interpretation on Article 31§1 and 31§4*, at 30-31.

<sup>50</sup> SPADARO 2006, 11837 ff.

<sup>51</sup> Moreover, the *Explanatory Report* to the ESCr states that «Whereas national extraction is not an acceptable ground for discrimination, the requirement of a specific citizenship might be acceptable under certain circumstances, for example for the right to employment in the defence forces or in the civil service» (no. 136).

or lawful residence may constitute valid grounds for differential treatments<sup>52</sup>. But, on the other hand, it has been also emphasised that art. E prohibits “indirect” discriminations too, which «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»<sup>53</sup>.

Anyway, the Committee has shown an advanced and very bold mindset in dealing with immigration problems, even challenging States policies that were (and still are) shared in part by national public opinions. This attitude serves as an *external* bulwark against high-impacting media policies that result in social exclusion and discriminatory treatments of single persons as well as of entire groups<sup>54</sup>; in so doing, the Committee also strengthens national courts’ efforts in restoring from *inside* the rule of law<sup>55</sup>.

It is therefore a matter of fact that bringing migrants’ legal status under the remit of international human rights law has not yet solved the many problems related to their economic and social integration, at least not as much as conversely happened in the field of classical civil rights. The role of the Committee is thus extremely crucial, given also that it is the only guardian *fully specialized* in the protection of social rights at European level. Although some remarkable progresses, until now neither the ECtHR nor the ECJ have been as well responsive on this field<sup>56</sup>. This acknowledgement, however, should not

<sup>52</sup> See, for the case-law above studied: *DCI v. the Netherlands*, § 73 and *DCI v. Belgium*, §§ 149-150.

<sup>53</sup> See, *inter alia*: *Association internationale Autisme-Europe v. France*, complaint no. 13/2002, decision on the merits of 4 November 2003, §52; *ERRC v. Greece*, complaint no. 15/2003, decision on the merits of 8 December 2004, §19; *ERRC v. Italy*, cited, §20; *ERRC v. Bulgaria*, complaint no. 31/2005, decision on the merits of 8 October 2006, §40.

<sup>54</sup> Two recent examples may be cited. First, the decision of UK Government to halve the time for EU migrants to claim unemployment benefits, on the ongoing refrain «Britain first» (see, amongst others, *The Financial Times* of July 29, 2014). Second, to the above mentioned Italian “segregating” policies on Roma and Sinti camping sites it now adds the fresh “Housing plan” launched under the Renzi Government, which denies legal residence and all relevant basic amenities to squatters, providing also that all contrasting measures be utterly void (art. 5, Law Decree no. 47/2014, amended and converted into law by Law no. 80/2014). This last regulation has been promptly criticised by UNHCR, for the concrete risk that its implementation might increase refugees’ marginalization and social exclusion.

<sup>55</sup> For example, in recent years, Italian Constitutional Court has held unconstitutional national and regional legislative acts subordinating the enjoyment of several social benefits by non-EU immigrants to the evidence of having already met the requisites that formed the exact content of the benefits claimed (see, *inter alia*, judgements no. 306/2008, 11/2009, 187/2010, 329/2011, 222/2013, 168/2014).

<sup>56</sup> In fact, the Committee has taken the side of the groups most affected by the austerity measures adopted by Greece under the pressure of the “Troika”, restating that domestic enactment of other international binding norms (EU Law included) does not absolve Member States from fulfilling the obligations undertaken under the Charter: see the decisions on the complaints no. 65-66/2011 and 76 to 80/2012 (for some comments: JIMENA QUESADA 2014a, 6 f.; BRILLAT 2013, 35 ff.; GUIGLIA 2013, 1400 ff.). Quite notably, the Committee has recently decided in a diametrically opposite way the case yet defined by the ECJ in the well-known *Laval*



lead in any way to the quest for a primacy or a hierarchy among European judicial bodies, but rather to *endeavour in developing a suitable theory of interwoven, complementary and subsidiary guarantees*<sup>57</sup>.

Furthermore, the flexible approach followed by Committee strengthens its “judicial-like” features. This evolution, however, not only depends on the introduction of appropriate changes regarding the body’s composition and election criteria or to its functioning (as for the current automatic filter of the Governmental Committee)<sup>58</sup>, but it also relies on the ability of the Committee to become more and more independent from the will of the Charter’s authors (national States as traditional *Lords of the Treaties, Herren der Verträge*), fostering its own autonomous and dynamic interpretation of the text, as it is indeed happening.

Thus, *not only a Committee but not yet a Court?*

The question is actually more complex. Each “welfare” choice affects the *political* dimension of a community, so that the issues of citizenship’s boundaries and of shared participation come every time at stake. Today, these issues ought to be looked at from a new angle and tackled with a renewed cultural and political view. By virtue of EU Law developments, in many European Countries *lawful residence is replacing citizenship* as the chief requisite enabling people for social entitlements, being a tangible sign of foreigner’s territorial entrenchment, first step towards effective integration in the society within which he/she lives. But, enduring the “representation paradox” (by which those excluded from the boundaries of political membership have no chance to take part in formulating inclusion/exclusion’s criteria)<sup>59</sup>, the claims relating to social rights end to bear upon the judiciary, whose reforming action is generally curbed by the structural borders delimiting their office<sup>60</sup>.

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judgment (relating to freedom of association and collective bargaining): see *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, complaint no. 85/2013, decision on admissibility and the merits of 3 July 2013 (for a comment: BASSINI and FERRARI 2014, 193 ff.; SALCEDO BELTRÁN 2014, 26 ff.). In this context, in his last report, the Secretary General of the Council of Europe has recommended, in a time of economic crisis and growing inequalities, to give the ESC «higher priority» and to strengthen its monitoring system (see *State of democracy, human rights and the rule of law in Europe*, May 2014, at 8).

<sup>57</sup> For a deeper expound on this key point, and further references, see PANZERA 2013a, at 47 ff.

<sup>58</sup> On these aspects see, *inter alia*, BOISSARD 2010, at 1106 ff.

<sup>59</sup> For a theoretical discussion of this point, see BENHABIB 2004, at 177.

<sup>60</sup> Nonetheless, as it is well known, especially Constitutional Courts have by now developed a strong set of decision-making techniques by which they are enabled, for example, to adjust the meaning of legislation without changing its text, or to add “new” rules to existent but lacking provisions, or even to influence the temporal cease of effects of legislative acts declared unconstitutional. The topic is too much extensive to be summed up in few words: for a comprehensive and detailed inquiry, see for all the comparative study carried out by A.R. BREWER CARÍAS 2011 (collecting a general introduction and numerous national reports); for a specific and updated insight on Italian situation, with further references, see instead, among others, PANZERA 2013b.

In this tangled and fluid context of mixed democratic majoritarian policies and constitutional judicial guarantees, it seems to me of the highest importance to not underrate *warnings, directives, incitements and advices* often expressed in judicial decisions, as positive stimuli directed to spur political bodies on pursuing the most attainable social progress. That is what the Committee does with regard to national authorities, not only by means of formal conclusions and decisions, but also by promoting useful academic congresses, debates and meetings on social rights topic, or by an untired sponsoring of the Charter and its values in the States that have not yet signed it.

Of course, at a *hard law* level, at least three desirable goals should be achieved: a) a less restrictive reformulation of the Appendix and an overall update of Charter provisions; b) the accession of EU to the Charter, in parallel to its accession to the ECHR already provided for in the Lisbon Treaty; c) providing Committee's decisions with legally binding effects.

In the meantime, it is unquestionable that the Committee has well served the fundamental demand for *equity* and *justice* often arisen from those who live at the edge of our societies. It is interesting to remind that one of the original meaning of the term "justice" (*iustitia*) is the rule "giving to each his own" (*unicuique suum tribuere*), where the core issue of the phrase lies in defining exactly of what does the "own/*suum*" consist. In conclusion of this paper, I suggest we should look beyond political, ethnic or religious memberships, and aim directly at human dignity. Justice is "giving to each his own": in other words, never denying to each person what is needed to preserve his/her dignity.

## BIBLIOGRAPHY

- AKANDJI-KOMBÉ J.-F. (2010a), «L'applicabilité ratione personae de la Charte sociale européenne: entre ombres et lumières», in O. De Schutter (coord.), *The European Social Charter: a Social Constitution for Europe/La Charte sociale européenne: une constitution sociale pour l'Europe*, Bruylant, Bruxelles.
- (2010b), «Charte social européenne et Convention européenne des droit de l'homme: quelles perspectives pour le 10 prochaines années?», in O. De Schutter (coord.), *The European Social Charter*.
- (2012), «De l'invocabilité des sources européennes et internationales du droit social devant le juge interne», in *Droit social*, n.º 11-12.
- BAILEY S., FARRELL G., MATTEI U. (eds.) (2014), *Protecting Future Generations through Commons*, Council of Europe Publishing, Strasbourg.
- BASSINI M., FERRARI F. (2014), «Reconciling Social Rights and Economic Freedom in Europe. A Constitutional Analysis of the Laval Saga (Collective Complaint n.º 85/2012)», in M. D'Amico, G. Guiglia (eds.), *European Social Charter and the Challenges of the XXI Century/La Charte Sociale Européenne et les défis du XXIe siècle*, Esi, Naples.
- BELL M. (2010), «Combating Discrimination through Collective Complaints under the European Social Charter», in O. De Schutter (coord.), *The European Social Charter*.
- BENHABIB S. (2004), *The Rights of Others. Aliens, Residents and Citizens*, Cambridge University Press, Cambridge.
- BIFULCO R. (2008), *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale*, Franco Angeli, Milan.
- BIFULCO R., D'ALOIA A. (eds.) (2008), *Un diritto per il futuro. Teorie e modelli dello sviluppo sos-*



- tenibile e della responsabilità intergenerazionale*, Jovene, Naples.
- BOISSARD B. (2010), «La contribution du Comité européen de droits sociaux à l'effectivité des droits sociaux», in *Reveu du droit public*, no. 4.
- BONETTI P., SIMONI A., VITALE T. (eds.) (2011), *La condizione giuridica di Rom e Sinti in Italia*, Giuffrè, Milan.
- BREWER CARÍAS (2011), *Constitutional Courts as Positive Legislators. A Comparative Law Study*, Cambridge University Press, New York.
- BRILLAT R. (2010), «The European Social Charter and Monitoring its Implementation», in N. Aliprantis, I. Papageorgiou (eds.), *Social Rights. Challenges at European, Regional and International Level*, Bruylant, Bruxelles.
- (2013), «The European Social Charter and the System of Protection of Social Rights in European sources», in M. D'Amico, G. Guiglia, B. Liberali (eds.), *La Carta sociale europea e la tutela dei diritti sociali*, Esi, Naples.
- DE SCHUTTER O. (2010a), «The Two Lives of the European Social Charter», in O. De Schutter (coord.), *The European Social Charter*.
- (2010b), «La contribution de la Charte sociale européenne à l'intégration des Roms d'Europe», in O. De Schutter (coord.), *The European Social Charter*.
- FERRERA M. (2005), *The Boundaries of Welfare. European Integration and the New Spatial Politics of Social Protection*, Oxford Univ. Press, Oxford-New York.
- GIUBBONI S. (2012), *Diritti e solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo*, il Mulino, Bologna.
- GUIGLIA G. (2011a), «The Opportunities of the European Social Charter (in Italy)», in [www.europeanrights.eu](http://www.europeanrights.eu)
- (2011b), «Il diritto all'abitazione nella Carta sociale europea: a proposito di una recente condanna dell'Italia da parte del Comitato europeo dei diritti sociali», in *Rivista Aic*, no. 3 ([www.rivistaaic.it](http://www.rivistaaic.it)).
- (2013), «Il diritto alla sicurezza sociale in tempo di crisi: la Grecia di fronte al Comitato Europeo dei Diritti Sociali (CEDS)», in *Diritto pubblico comparato ed europeo*, no. IV.
- GUILD E. (2004), *Who is an Irregular Migrant?*, in B. Bogusz, R. Cholewinski, A. Cygan, E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Nijhoff, Leiden-Boston.
- JIMENA QUESADA L. (2009), «La Carta social europea y la Unión europea», in *Revista europea de derechos fundamentales*, núm. 13/1<sup>st</sup> semestre.
- (2013), *Jurisdicción nacional y control de convencionalidad. A propósito del diálogo judicial global y de la tutela multinivel de derechos*, Aranzadi, Cizur Menor (Navarra).
- (2014a), «La protección internacional de los derechos sociales y laborales la Carta Social Europea y el Comité Europeo de Derechos Sociales», in *Estudios Fundación 1 de Mayo*, núm. 79.
- (2014b), «Interdependence of the Reporting System and the Collective Complaint Procedure: Indivisibility of Human Rights and Indivisibility of Guarantees», in M. D'Amico, G. Guiglia (eds.), *European Social Charter*.
- O'CONNOR C. (2010), «Social Rights and the European Social Charter - New Challenges and Fresh Opportunities», in O. De Schutter (coord.), *The European Social Charter*.
- PALMISANO G. (2009), «Trattamento dei migranti clandestini e rispetto degli obblighi internazionali sui diritti umani», in *Diritti umani e diritto internazionale*, no. 3.
- (2013), «Sui limiti di applicazione della Carta sociale europea in termini di persone protette», in M. D'Amico, G. Guiglia, B. Liberali (eds.), *La Carta sociale europea*.
- PANZERA C. (2013a), «Per i cinquant'anni della Carta sociale europea», in *Lex social. Revista jurídica de los derechos sociales*, no. 1 ([www.lexsocial.es](http://www.lexsocial.es))
- (2013b), *Interpretare Manipolare Combinare. Una nuova prospettiva per lo studio delle decisioni della Corte costituzionale*, Esi, Naples.
- SALCEDO BELTRÁN M.C. (2013), «Incumplimiento por España de los tratados internacionales: Carta Social Europea y período de





- prueba (a propósito de la SJS núm. 2 de Barcelona de 19 de noviembre de 2013)», en *Revista de derecho social*, núm. 64.
- SALCEDO BELTRÁN M.C. (2014), «El Consejo de Europa frente a la Unión Europea. Vulneración de la Carta Social Europea por “Lex Laval”», en *Estudios Fundación 1 de Mayo*, núm. 77.
- SPADARO A. (2006), «Uguaglianza», in *Enciclopedia filosofica*, vol. XII, Bompiani, Milan.
- SPADARO A. (2008), *Libertà di coscienza e laicità nello Stato costituzionale. Sulle radici “religiose” dello Stato “laico”*, Giappichelli, Turin.

## TÍTULO

EL ÁMBITO DE APLICACIÓN PERSONAL DE LA CARTA SOCIAL EUROPEA: CUESTIONANDO LA IGUALDAD

## SUMARIO

I. *CHARTA LOCUTA CAUSA FINITA?* II. LAS EXCLUSIONES ESTABLECIDAS EN LA CARTA... III. ... Y ALGUNOS INTENTOS DOCTRINALES DE *PUENTEARLAS*. IV. EL (CUASI-) JUDICIAL ACTIVISMO DEL COMITÉ EUROPEO DE DERECHOS SOCIALES. V. REFLEXIONES FINALES.

## PALABRAS CLAVE

*Carta Social Europea; Ambito personal; Inmigrantes; Residencia ilegal; Minoría trabajadora; Comité Europeo de Derechos Sociales; Dignidad humana; Protección multinivel; Interpretación dinámica.*

## RESUMEN

*La Carta Social Europea, adoptada por los Estados miembros del Consejo de Europa en 1961 y revisada en 1996, pretende acoger y poner en práctica, en el Viejo Continente, los valores y los objetivos de la Declaración Universal de Derechos Humanos de 1948. En su condición de necesario “complemento” del Convenio Europeo de Derechos Humanos de 1950, la Carta participa asimismo de la plena afirmación del principio de “indivisibilidad” de los derechos fundamentales. Dicha finalidad, sin embargo, corre el riesgo de quedar frustrada a causa de las limitaciones previstas en el ámbito de aplicación de la Carta (véase, sobre todo, el Anexo). A través del análisis crítico de las restricciones, el presente artículo pretende evaluar la actualidad de tales restricciones, sobre todo tomando en consideración el enfoque más elástico adoptado en el procedimiento de reclamaciones colectivas por el “guardián” de la Carta, el Comité Europeo de Derechos Sociales, el cual en diferentes ocasiones ha extendido razonablemente las garantías previstas también a aquellos que formalmente no eran sus destinatarios. Dado que no se ha producido una revisión formal del texto in parte qua (en dicho terreno), únicamente una recepción efectiva y generalizada de esta “jurisprudencia” en los sistemas jurídicos de cada Estado Parte podrá evitar el peligro de una marginación progresiva de la Carta en el contexto del constitucionalismo multinivel europeo.*