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Discretion and Its Limits: How States Shall Implement the European Social Charter and When Legislation is Compulsory

Part V, Art I (revised charter) Implementation of the undertakings given

I. INTRODUCTION

Art. I of Part V of the Revised European Social Charter obliges states to choose and then put in practice appropriate means and methods to implement the articles of Part II of the Social Charter, i.e. the obligations which give effect to the rights and principles the Social Charter[1] aims to protect. The second paragraph of the article stipulates that for some obligations, it suffices if they are applied "to the great majority of the workers concerned". *A contrario*, this means that the provisions of PartII not listed in the second paragraph of art. I must be applied universally to the entire group of those falling within the scope of a provision. For instance, compliance with the right of young workers and apprentices to a fair wage or other appropriate allowances is only considered effective if it is applied to *all* young workers and apprentices.[2]

One might think that art. I is most noteworthy because of the "great majority of workers" issue. Indeed, it is unique, and many say anomalous,[3] that a human rights treaty stipulates that it is acceptable not to apply certain rights to all individuals falling within the personal scope of a provision.[4] We will return to that aspect of the provision in section V. However, the first paragraph of article I deserves at least equal attention as the "great majority of workers" issue. The domestic implementation of human rights treaties is the decisive step required to make human rights a reality. It is one thing to celebrate progressive human rights treaties at the international level but the "legislative and judicial implementation into national legal

[1] This commentary uses the term "Social Charter" or "Charter" as a shorthand for either the original Charter of 1961 or the Revised Social Charter when it is not necessary to distinguish the two.
[2] Matti MIKKOLA, *Social Human Rights of Europe* (Porvoo: Karelactio, 2010), p. 77.
[3] The logic of human rights is "a logic at once expressive of the individualization of protection *(each* person has the right to protection) and of the universality of the same (*all* people have the right to protection)". Jean-François AKANDJI-KOMBÉ, "The Material Impact of the Jurisprudence of the European Committee of Social Rights," in *Social Rights in Europe* (Oxford: Oxford University Press, 2005), pp. 89-108: p. 99.
[4] Note that there is a second "anomaly and inadequacy" in the way the Social Charter limits its own reach, namely the limitation of the personal scope of the Charter concerning non-nationals. On this separate issue, see the commentary of the Appendix [insert x-ref to this commentary]. The qualification as an "anomaly and inadequacy" is, e.g. found in Guiseppe PALMISANO, "Overcoming the Limits of the European Social Charter in Terms of Persons Protected: The Case of Third State Nationals and Irregular Migrants," in *European Social Charter and the Challenges of the XXI Century*, ed. Giovanni GUIGLIA and Marilisa D'AMICO (Napoli: Edizioni scientifiche Italiane, 2014), pp. 171-91: p. 176.

systems has always been a difficult process, more often avoided than pursued".[5] Article I provides compulsory guidelines on the key process of domestic implementation and is thus an important provision of the Social Charter. This commentary first presents the history of article I of the Revised Social Charter (section II), then turns to the normative structure of the article (section III) and the question of when the adoption of domestic legislative measures is compulsory (section IV) before examining the "great majority of workers" issue (section V) and concluding on the legal nature of the provision in section VI.

II. HISTORY OF THE PROVISION

The original Charter of 1961 contains article 33, which is a remote precursor of art. I of the revised Charter. Art. 33 of the 1961 Charter focuses exclusively on "implementation by collective agreements". The provision already contained the "great majority of workers" formulation but it did not yet contain the list of methods of implementation now listed in the first paragraph of art. I and the emphasis on the effectiveness of the methods chosen by States Parties. Later, in 1988, article 7 of the Additional Protocol introduced the list of implementation methods. Subsequently, the Revised Charter went a step further: The major difference between article 7 of the Additional Protocol of 1988 and the Revised Charter is the fact that the Revised Charter insists that the relevant provisions "*shall* be implemented" by one of the listed methods, whereas the precursor provision in the 1988 Protocol merely stipulated that the "relevant provisions may be implemented" by one of the listed approaches. From a list of recommended methods, the wording changed to a list of enumerated means from which states are obliged to choose in order to realize the effective implementation of the relevant provisions (without prejudice to the methods of implementation foreseen in specific articles). According to the Explanatory Report, "[t]his composition has been chosen so as not to interfere with the case law of the Committee of Independent Experts according to which a certain form of implementation, such as legislation, is sometimes required. The word 'shall' indicates that the method chosen must be efficient."[6]

III. THE BASIC STRUCTURE: STATE DISCRETION BUT SUCH DISCRETION IS NOT UNLIMITED

States enjoy significant discretion when deciding how they plan to implement the obligations they have assumed at the international level. Yet, such discretion is not unlimited. Article I foresees two main limitations on state discretion in the choice of implementation methods: First, sometimes, specific provisions foresee specific ways how states shall implement their obligations. Second, the chosen measures must be effective, and states must justify their choice with a view to effective implementation in law and in fact. This section will first briefly indicate how specific provisions can indicate specific implementation methods which must be followed, and which prevail over the usual discretion (lex specialis) (A). Second, the section outlines what it means for states to have significant discretion in the choice of implementation method (B) and how this discretion relates to the effectiveness criterion (C).

A. NORMS EXPLICITLY FORESEEING SPECIFIC METHODS

Not all provisions of the Social Charter leave the choice of means entirely to the States Parties. For some provisions, states agreed to specify implementation measures in the Charter. For instance, Art. 2 paragraph 2 of Part II stipulates that States undertake to "provide for public holidays with pay", which is a provision leaving little discretion to States Parties given that "providing for public holidays with pay" almost inevitably means that States must adopt some sort of legislation to meet this obligation. Other provisions, however, can be implemented by a range of measures. Removing "as far as possible the causes of ill-health" (art. 11 para. 1 of Part II), for instance, requires different measures in different states and in relation to different causes of ill-health. Vice versa, the opposite situation exists for art. 26 of the Social Charter where the appendix explicitly states that "[i]t is understood that this article does not require that legislation be enacted by the Parties". As Teun writes, this might seem to support, *a contrario*, the view that

[5] Gisella GORI, "Domestic Enforcement of the European Charter: The Way Forward," in *The European Social Charter and the Employment Relation*, ed. Niklas BRUUN, et al. (Oxford: Hart Publishing, 2017), pp. 69-88: p. 69.
[6] Explanatory Report to the European Social Charter (Revised), ETS 163, 3 May 1995, § 139.

"at least in principle, other articles require legislation, [7] although we will see that the Committee has been more nuanced and has not always required implementation by legislation.[8]

B. DISCRETION

As mentioned, the Social Charter provisions can usually be implemented in many ways, and it often makes sense to combine more than one implementation method, as is recognized by article I (paragraph 1, letter c). As Teun notes, "[t]he Charter can be implemented in various ways, as article I indicates. Implementation is an obligation imposed on the state — the State Party has to take action in order to ensure that the provisions are implemented in domestic law and practice. Legislation is the most usual way, but not the only one. (…) Implementation by collective agreements is another way of implementing Charter provisions, recognising the important role social partners can play.[9] Furthermore, article I refers to "other appropriate means", suggesting that States can resort to other implementation measures as long as these are "appropriate" in the circumstances in which the State finds itself.

In comparison with many other instruments with strong social rights aspects, article I is relatively specific. Many ILO Conventions, for instance, do not have specific implementation provisions. The European Convention on Human Rights "simply" stipulates in Art. 1 that States "shall secure to everyone within their jurisdiction the rights and freedoms" contained in the treaty but the ECHR does not have an implementation provision with a list of implementation methods. The International Covenant on Economic, Social and Cultural Rights refers to "all appropriate measures, including in particular the adoption of legislative measures".[10] Some ILO Conventions go further and provide that the provisions of a Convention shall "in so far as they are not otherwise made effective by means of statutory wage fixing machinery, collective agreements, arbitration awards or in such other manner consistent with national practice as may be appropriate under national conditions, be given effect by national laws or regulations".[11] In the more recent human rights conventions of the UN or the Council of Europe, for instance, states have also increased the level of precision in drafting implementation clauses (or "general obligations" clauses).[12]

From a human rights perspective, discretion is a double-edged sword. The disadvantage of leaving discretion to states is obviously the vagueness of the formulation of obligations. States can hide between vague norms and claim that they have sufficiently implemented a provision when they have not done much. Furthermore, the vaguer an international norm, the less likely domestic courts will be to apply it.[13] At the same time, discretion is used to motivate states to ratify treaties and, if used well, to implement provisions in the way that best fits states' domestic legal system and their economic, social, cultural and political circumstances. Discretion also comes with the advantage that states can experiment with various implementation approaches and learn from best practices and comparative experiences.

How does discretion relate to the fact that the implementation of many Charter obligations is resource dependent? Many (but not all) obligations of the Social Charter are of a positive nature and their implementation involves public resources. The ICESCR provides that each state shall "take steps" "to the maximum of its available resources".[14] Article I choses a different approach and contains no reference to the availability of resources but accepts that compliance is "effective" for some provision if the relevant

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[7] Jaspers TEUN, "Implementation : Article I," in *The European Social Charter and the Employment Relation*, ed. Niklas BRUUN, et al. (Oxford: Hart Publishing, 2017), pp. 63–86: p. 70.
[8] See below section V.
[9] Jaspers TEUN, *op. cit (n.7)*., p. 66.
[10] International Covenant on Economic, Social and Cultural Rights, GA Res. 2200a (XXI), 16 December 1966 (entered into force 3 January 1976), art. 2(1).
[11] ILO Convention No. 106 Concerning Weekly Rest (Commerce and Offices), 325 UNTS 279, 26 June 1957 (entered into force 4 March 1959), art. 1.
[12] A good example is art. 4 of International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, GA Res. 61/106 (2006). Or the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 11 May 2011 (entered into force 1 August 2014).
[13] See below, section V on direct applicability at the domestic level.
[14] ICESCR, art. 2(1).

provisions are applied to the great majority of workers. Although there is no reference to resource availability or progressive realization in article I,[15] the Committee has, to some extent,[16] taken into account the resource realities of states parties and has recognised as "dynamic"[17] certain obligations.[18] Generally, the fact that most Charter provisions offer significant discretion to the state parties implies that the realization of a right can take a different meaning the higher the level of economic development of the state. If economic conditions improve, the meaning of "just remuneration", for instance, will also change over time. Some provisions contain explicitly progressive obligations, e.g. to "raise progressively the system of social security to a higher level" (art. 12(3) of the revised Charter). In *Autism-Europe v. France*, the Committee explained, in a now often-cited paragraph, how states shall interpret their obligations when the implementation of a provision is resource-intense:

"When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings."[19]

In relation to the right to decent remuneration and a decent standard of living, the Committee has been very specific in its interpretation but it has made such interpretation relative to the context in which it is applied: hence, for Article 4 paragraph 1, the Committee found that it is the level of 60 per cent of the net average household income is the meaning of "appropriate remuneration".[20] Similarly to the Committee on ESCR of the United Nations, the Committee of Social Rights of the Council of Europe has also developed an approach to non-retrogression, i.e. the idea that contracting parties need to maintain the level of achievement over the years, unless they have very compelling justifications to reduce the level of protection.[21] The Committee requires that a retrogressive measure be only taken to safeguard the viability of a protective system as a whole (such as the entire social security system); if it is non-discriminatory and if it is not falling short of a minimum level of protection.[22]

As mentioned, the term "may" was changed to "shall" when the Charter was revised. This choice indicates that states must choose one of the enumerated means of implementation and "the methods or mix of methods must be effective".[23]

C. THE EFFECTIVENESS CRITERION

Whether or not a method of implementation is "effective" is an assessment that must be made in relation to the "facts on the ground". The drafters chose to begin the substantive Charter provisions with the words "with a view to ensuring the effective exercise of the right to…" and repeating such language

[15] For a discussion of this difference between the Social Charter and the ICESCR, see also Urfan KHALIQ and Robin CHURCHILL, "The European Committee on Social Rights: Putting Flesh on the Bare Bones of the European Social Charter," in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm LANGFORD (Cambridge: Cambridge University Press, 2008), pp. 428-52: p. 434.
[16] After the reunification of Germany, the Committee, "has expected Germany the meet the standards of the Charter vis-à-vis the whole of its territory straight away and regardless of cost". Discussed in David J. HARRIS and John DARCY, *The European Social Charter*, 2nd edn, The Procedural Aspects of International Law Monograph Series (Ardsley: Transnational, 2001), p. 26-27. However, since *Autism-Europe*, the Committee takes a more nuanced approach and no longer applies "a common standard of all States parties, regardless of their relative economic wealth". Urfan KHALIQ and Robin CHURCHILL, *op. cit (n.15).*, p. 434.
[17] "Dynamic in the sense that they 'impose an obligation to adopt over the years a course of conduct so as to achieve a development in a stated direction'." David J. HARRIS and John DARCY, *op. cit (n.16).*, p. 27, fn 121 for examples.
[18] Ibid., p. 28.
[19] ECSR, *Autism-Europe v. France,* Complaint No. 13/2002 (Merits), 4 November 2003, § 53.
[20] Zoe ADAMS and Simon DEAKIN, "The Right to a Fair Remuneration," in *The European Social Charter and the Employment Relation*, ed. Niklas BRUUN, et al. (Oxford: Hart Publishing, 2017), pp. 198-219: 201ff.
[21] See notably the various complaints against Greece in the wake of austerity, all decided on 7 December 2012.
[22] ECSR, *Federation of Employed Pensioners of Greece (Ika –Etam) v. Greece,* Complaint No. 76/2012, 7 December 2012, §§ 71ff.
[23] Explanatory Report to the Additional Protocol to the European Social Charter, ETS 128, 5 May 1988, § 32.

undoubtedly places great emphasis on effectiveness, and the effectiveness criteria is confirmed in article I paragraph 2 which mentions that measures shall be effective.[24]

Article I involves an implicit justification requirement. It is up to states to explain why they believe that a certain method of implementation is sufficiently effective.[25] In order to facilitate the assessment of the effectiveness of an implementation method and how it deploys effects in practice, it is necessary that states collect data. Art. I thus implies an obligation for states to collect statistical data on the implementation of the provisions given that the effectiveness can only be assessed in light of the realities of the state party.[26]

There is not one implementation method that is always effective. Yet, adopting or changing domestic legislation is a crucial way to implement social rights. Teun refers to "the royal way".[27] Indeed, the engagement of domestic legislators is crucial to bring about changes and there are many examples in which Social Charter rights have been implemented by legislation which in turn brought changes in practice.[28]

Yet, legislation is not always needed and the question whether states are obliged to legislate is not straightforward to answer. Much depends on the interaction between the international law instrument and the domestic constitutional and judicial system. For instance, if international norms are considered directly applicable in a given domestic legal system or when other approaches lead to the intended level of protection, legislative implementation may not necessarily be required.[29] We will thus have to consider in more detail when legislation is required.

IV. WHEN IS LEGISLATION COMPULSORY?

Whether or not legislation is required is an assessment for states and for the Committee to be made pursuant to the rules of interpretation relevant to human rights instruments and considering the domestic legal system of the state concerned. Depending on the circumstances, the Committee has sometimes found that a certain implementation method was required because the Committee considered that legislation is the only way in which the effectiveness criteria can be met.

The rules of interpretation contained in article 31 of the Vienna Convention on the Law of Treaties (VCLT) of 1969 are relevant given that states entrust the Committee to interpret the treaty. Article 31 VCLT notably requires that treaty norms be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[30] As with other human rights treaties, the object and purpose of the Social Charter is to protect the enjoyment of rights by individuals and the teleological interpretation therefore has considerable weight. As Harris and Darcy summarize, "[w]hen interpreting and applying the Charter, the Committee has consistently emphasized the need to look beyond the letter of the law to see how it operates in practice."[31]

The Committee has interpreted the Social Charter to require implementation by legislation as the only "effective" and "appropriate" way in relation to several issues. Notably in order to make the prohibition of discrimination effective, the Committee stated that domestic law "must at least provide that any provision contrary to the principle of equal treatment which appears in collective labour agreements, in

[24] Jaspers TEUN, *op. cit (n.7)*., p. 64.
[25] See also ibid., p. 69, Matti MIKKOLA, *op. cit (n.16 2)*., p. 76.
[26] Olivier DE SCHUTTER, "The European Social Charter," in *International Protection of Human Rights: A Textbook*, ed. Catarina KRAUSE and Martin SCHEININ (Turku/Åbo: Åbo Akademi University, Institute for Human Rights, 2009), pp. 425-42: p. 441.
[27] Jaspers TEUN, *op. cit (n.7)*., p. 66.
[28] Luis JIMENA QUESADA, "Interdependence of the Reporting System and the Collective Complaint Procedure: Indivisibility of Human Rights and Indivisibility of Guarantees," in *European Social Charter and the Challenges of the XXI Century*, ed. Giovanni GUIGLIA and Marilisa D'AMICO (Napoli: Edizioni scientifiche Italiane, 2014), pp. 143-58: p. 144. Gisella GORI, *op. cit (n.5)*., p. 74.
[29] Jaspers TEUN, *op. cit (n.7)*., p. 66.
[30] Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), art. 31(1).
[31] David J. HARRIS and John DARCY, *op. cit (n.16)*., p. 25.

employment contracts or in firms" own regulations may be declared null or be rescinded, abrogated or amended" and that appropriate and effective remedies and are available.[32] Legislation is undoubtedly also required, for instance, to ban unjustified dismissals of pregnant women or women on maternity leave,[33] or the right to women and men to "equal pay for work of equal value" must be expressly provided for in legislation.[34] For other examples, reference is made to the 2018 Digest of the Case Law of the European Committee of Social Rights.

The question of whether a specific Charter provision requires legislative implementation is not easy to answer in cases in which the norm does not explicitly foresee specific implementation mechanisms.[35] This difficulty arises because a certain implementation mechanism can be effective in one state but not in another. Whether or not legislation is required to achieve effective implementation hinges on considerations of the concrete situation of each state and notably on domestic constitutional law.

Legislation is not required if a right can be effectively protected because the norm is directly applicable at the domestic level. A norm that is directly applicable at the domestic level is a norm that domestic authorities and courts can use to immediately protect an individual person's right. This route, however, is most often not available in practice. Where domestic courts can contribute to the implementation of the Social Charter, it is most often because the state has also adopted domestic legislation opening avenues for domestic remedies in domestic legislation but *not* (or not merely) based on the Social Charter.

The Appendix to the Social Charter indicates that "the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof'. The drafters wanted to avoid that the Committee would interpret the Charter to mean that states must create enforceable remedies in their domestic courts.[36] According to the preferences of states at the time of the drafting of the Appendix, individuals should not have the possibility to invoke the Charter provisions before domestic tribunals even in states in which international treaties, once they enter into force in a ratifying state, are considered part of the law applicable within the national jurisdiction (i.e. so called monist states). But even in monist states, although treaties acquire domestic validity at their entry into force for that state, this does not mean that individuals will be able to invoke treaty norms before domestic courts. Such invocation is only possible in cases of norms that can be considered directly applicable (sometimes, the term "self-executing" or "direct effect" is also used).[37] The relationship between the international treaty norms of the Social Charter and the various domestic legal orders is complex. It is, for instance, to sweeping to state that "[g]enerally speaking, traditional international treaties are not accorded direct applicability".[38] Rather, each monist jurisdiction has its own set of (rather vague) criteria to decide whether an international norm is directly applicable. The common denominator is the degree of specificity of the norm, i.e. whether it is worded in a way that permits a court to apply it without requiring the concretization by the domestic legislator. Despite the language in the Appendix of the Social Charter, some domestic courts have found a limited number of provisions of the Charter to be directly applicable,[39] but the relevant norms are also part of other treaties such as the

[32] Concluding Observations, Iceland, Conclusions XVI-1 - Article 1-2, 30 May 2003. For further examples, see the Régis BRILLAT, *Digest of the Case Law of the European Committee of Social Rights* (Strasbourg: Council of Europe, 2018).
[33] Ibid., p. 117f, except in cases of misconduct, business failure or expiration of temporary contracts.
[34] Ibid., p. 88.
[35] Evelyne SCHMID, "The Identification and Role of International Legislative Duties in a Contested Area: Must Switzerland Legislate in Relation to «Business and Human Rights»?," *Swiss Review International and European Law*, no. 4 (2015) pp. 563-89.
[36] David J. HARRIS and John DARCY, *op. cit (n.16)*., p. 395.
[37] Evelyne SCHMID, "How Upper Levels Strive to Influence Law-Making at the Lower Levels and Why Lower Levels Can't Have Cake and Eat It," in *Lawmaking in Multi-level Settings Legislative Challenges in Federal Systems and the European Union*, ed. Patricia POPELIER and Felix UHLMANN (Antwerp: Hart/Nomos, 2019), pp. 43-67: p. 56f.
[38] Gisella GORI, *op. cit (n.5)*., p. 70. It is inaccurate to suggest that international treaty provisions "could not be accorded direct applicability until the legislator intervened" because the international norm does not become directly applicable when the domestic legislators legislates, but the court or the authorities will apply the domestic legislation containing the substantive protection.
[39] E.g. the Supreme Court of The Netherlands found art. 6(4), the right to strike, to be directly applicable. *Supreme Court, Railway Strike, 30 May 1986, Nj (1986) No 688*, The Netherlands, consid. 3.2. Cited in David J. HARRIS and John DARCY, *op. cit (n.16)*., p. 395f.

ECHR and such cases remain exceptional.[40] In practice, an implementing act is sometimes also useful even if a provision of the Social Charter is (arguably) directly applicable and is accorded priority over potentially conflicting national laws,[41] because courts might not be aware of the international law norm, standing rules might be too restrictive, or international norms might not implemented in practice for other reasons. Hence, the vast majority of provisions in the vast majority of states heavily depend on the engagement of national (and sometimes infranational) legislators.

Domestic legislators have different tools of how they can implement Social Charter provisions. Depending on the constitutional system, a state might incorporate international law norms into domestic constitutions or domestic legislation, and states can or cannot mention the origin of the norms in the domestic legislation, they can adopt a single document with substantive Charter provisions or they can incorporate each substantive idea of Charter norms wherever it fits best into the most relevant domestic pieces of legislation (e.g. the labour code, social security legislation etc).[42] Based on empirical experiences with the implementation of international treaties, it is fair to say that Teun rightly recommends "that states incorporate the respective treaty provisions into domestic law and provide them with appropriate status" in order to secure their effectiveness.[43]

Even if it is sometimes difficult to explicitly decide from Charter provisions that domestic legislative measures are required, there is widespread consensus that the adoption of (well applied) domestic legal rules is the preferred implementation method from the point of view of the effectiveness of protections. Teun summarizes that states renouncing to legislative implementation for some provisions may have well-conceived and applied social policy or collective agreements in conformity with the Social Charter obligations but the Committee continues to ask the state "to guarantee the continuation of this practice, preferably by adopting legal rules, if possible."[44] As with other implementation methods, the effectiveness of implementing Social Charter provisions by collective agreements between social partners largely depends on the domestic legal system of member states. In any event, States must ensure that collective agreements actually contribute to the realization of the rights enshrined in the Charter and that they do "not run counter to obligations entered into, either through the rules that such agreements contain or through the procedures for their implementation".[45] Collective bargaining and the way social partners interact in a state and how national law recognises and enforces collective agreements varies in Council of Europe member states. The most relevant consideration, as mentioned above, should be the effective protection of the rights. If a state convincingly regulates an issue within the scope of the Charter by ways of collective agreements, if these agreements are consistently applied and cover all persons within the scope of application of the Social Charter provision, the state is acting in conformity with the Social Charter, unless the Charter norm explicitly requires a specific implementation method.[46]

In any event, as already mentioned, as with the ICESCR, states have a justification requirement to explain how their implementation method conforms to the international obligation.[47] In order to respect the discretion of states and to encourage the creative thinking to implement rights, it is useful to insist on this justification requirement while at the same time not excluding that a certain method can be effective in one state but not in another. It is thus legally appropriate and legitimate to conclude that legislative implementation is the only effective way of implementation in one state but not necessarily in another. This assessment is not static and may evolve over time.

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[40] Gisella GORI, *op. cit (n.5).*, p. 69.
[41] Jaspers TEUN, *op. cit (n.7).*, p. 67-68.
[42] Ibid., p. 69.
[43] Ibid.
[44] Ibid., p. 69, fn 21.
[45] ECSR, *Confederation of Swedish Enterprise v. Sweden,* Complaint No. 12/2002, 15 May 2003, §§27-28.
[46] There was a debate on this issue in ECSR, *Confédération française de l'encadrement v. France,* Complaint No. 9/2000, 16 November 2001, §35. In the specific case, the Committee was of the view that guarantees were insufficient, but it did not exclude the possibility to regulate by collective agreements as such.
[47] See already above, fn 25.

Legislation alone is insufficient. As the Charter aims at effective protection, the Committee emphasises that "the aim and purpose of the Charter, being a human rights instrument, is to protect rights not merely theoretically, but also in fact".[48] This is also underlined by the choice of the word "applied" in paragraph 2 of article I. Something that is "applied" is not simply "applicable" but also enforced. As Harris and Darcy explain, a state can thus fail to comply with the obligations of the Social Charter "even though its law is in order if in reality the position remains unsatisfactory", as happened in *ICJ v. Portugal* where there was a domestic law but that law was insufficiently enforced.[49] In other cases, the way domestic legislation is applied in practice can lead to discriminations and thus not be in conformity with the Charter.[50] In sum, what is needed are "good legal sources and good practices – *de bons textes et de bonnes pratiques*."[51]

V. PARAGRAPH 2: THE "GREAT MAJORITY OF WORKERS CONCERNED"

As mentioned in the introduction, the second paragraph of article I stipulates that for some obligations, it suffices if they be applied "to the great majority of the workers concerned". This means that some lack of protection is tolerated in some circumstances. The analysis must proceed in two steps: First, it must be verified if an issue falls within the scope of application of one of the undertakings "deriving from the provisions of paragraphs 1, 2, 3, 4, 5 and 7 of Article 2, paragraphs 4, 6 and 7 of Article 7, paragraphs 1, 2, 3 and 5 of Article 10 and Articles 21 and 22 of Part II" of the Charter. It is only in relation to these aspects of the Social Charter that the "great majority limitation" applies. Assuming that an issue falls within one of the listed provisions, the second step of the analysis is to verify whether the state effectively applies the provision to the great majority of the workers concerned, i.e. whether those who are not protected in practice are really just a small minority of the workers concerned. There is no simple arithmetic test to determine the threshold between a small minority of workers and the "great majority". In the Appendix, it is stated that "workers excluded in accordance with the appendix to Articles 21 and 22 are not considered in establishing the number of workers concerned." Moreover, it is sometimes contested which group counts as the entire group (the 100 per cent) of "workers concerned".[52] This question might gain in importance with new realities on a fragmented labour markets (zero hour contracts, quasi-self-employed workers and platforms etc.).

The ordinary meaning of the term "great majority" implies that protections must be applied to very significant majorities. In *ICJ v. Portugal*, the Committee suggested that it might hypothetically have found Portugal in compliance with the Charter if the number of children working contrary to the obligations of Portugal of Art. 7 Charter of 1961 had not been so high. The earlier approach of the Committee was to consider that a satisfactory protection must be applied to at least 80 per cent of workers,[53] although the arithmetic threshold question always worried members of the Committee.[54] Subsequently, however, the difficulty to draw an arithmetic line of what constitutes "the great majority", and the conceptual unease of such a clause in a human rights instrument, the Committee developed a case-by-case approach. It tends to look more closely at the reasons why a certain minority of workers does not enjoy a satisfactory protection of a relevant Charter norm.[55]

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[48] ECSR, *Autism-Europe v. France,* Complaint No. 13/2002 (Merits), 4 November 2003, §53. ECSR, *International Commission of Jurists v. Portugal,* Complaint No. 1/1998, 9 September 1999, §32.
[49] David J. HARRIS and John DARCY, *op. cit (n.16).*, p. 25.
[50] Skillfully discussed in Manuela BRILLAT, "Ombre et Lumière du Comité européen des droits sociaux: Confederazione Generale Italiana Del Lavoro C. Italie," *Revue trimestrielle des droits de l'homme* 27, no. 108 (2016) pp. 1007-18: p. 1008ff.
[51] Jean-Michel BELORGEY, *La Charte sociale du conseil de l'Europe et son organe de régulation: Le Comité européen des droits sociaux* (2007), p. 791.
[52] Jaspers TEUN, *op. cit (n.7).*, p. 73. See also article 24(2) of the Appendix to the Revised Charter which allows states to further exclude some workers from the scope of protection (e.g. workers during the probation period).
[53] E.g. Concluding Observations, Finland, Conclusions XIII-5 - Article 2 of the 1988 Additional Protocol, 30 September 1997.
[54] Jean-François AKANDJI-KOMBÉ, *op. cit (n. 3).*, p. 99.
[55] See also Holly CULLEN, "The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights," *Human Rights Law Review* 9, no. 1 (2009) pp. 61-93: p. 85.

The approach of the Committee to avoid an arithmetic threshold is welcome. The object and purpose of paragraph 2 of article I is to provide a safeguard for states for cases in which a protection is not applied universally to all workers concerned; while the aim of the treaty is in principle, to protect the whole population. Given the practical challenges to implement social rights and to enforce them correctly to all individuals, states protected themselves by foreseeing that some cases of non-compliance would not result in findings of state responsibility. However, the purpose of the clause is not to deliberately exclude entire categories of workers in the implementing legislation or in other implementation methods.[56] In *Confédération française de l'encadrement v France*, the French government used the "great majority of workers" clause to justify why a piece of legislation excluded a large category of persons from the scope of protection.[57] This position found the support of two members of the Committee who issued a partial dissenting opinion on the interpretation of article I of the Revised Charter whereas the majority of the Committee concluded that "the application of Article I of the revised Social Charter cannot give rise to a situation in which a large number of persons forming a specific category are deliberately excluded from the scope of a legal provision".[58] According to the partial dissenting opinion, this interpretation by the Committee "amounts in effect to fundamentally restricting and undermining the scope and purpose of Article I" because, according to the dissenters, "[t]here is nothing in the wording of Article I to suggest that if legislation is employed as a means of implementation, a contracting party is barred from not extending the protection otherwise afforded to a category of workers, or to a part of the workforce".[59] The partial dissenters, in my view, make a valid point. The wording of article I does not seem to prohibit a state from excluding a certain category of workers from the scope of application of a protection. At the same time, article I stipulates that protection for some articles shall be regarded as effective if the provisions are *applied* to the great majority. The ordinary meaning of the verb "to apply" refers to protections that are applied in concrete cases, going beyond the definition of the personal scope of domestic legal protections in the legislation. Hence, according to the majority of the Committee, para. 2 of article I is indeed not a tool for states to exclude distinctive and categories "with a large number of persons" from the protection at the outset, e.g. when new legislation is drafted because such a practice would often almost automatically imply that protections are not applied to the great majority of workers. The clause is better seen as a tool for a state to avoid state responsibility if there are some inadvertent or unforeseen gaps in the effective protection of certain aspects of the Charter. The position of the majority and the position of the partial dissenters is not irreconcilable because the Committee referred to categories "with a large number of persons" and it did, therefore, not rule out the possibility that a state could be in conformity with the Charter even if it deliberately excludes from the scope of protection some categories of workers, as long as this does not "give rise to a situation in which a large number of persons forming a specific category are deliberately excluded from the scope of a legal provision".[60] In any event, a state deliberately excluding entire categories of workers will incur a significant risk of non-compliance because several gaps combined could easily mean that the protection level falls below the threshold of the "great majority of workers".

To conclude this commentary, I discuss whether article I is an interpretative principle or a primary norm whose breach can lead to a violation of international law.

VI. CONCLUSION

In complaint no. 26/2004, a French trade union alleged that a French legislation was in breach of the right to organize and bargain collectively (arts. 5 and 6 ESC) because the legislation did "not guarantee collective legal remedies" to those wishing to challenge elections to the National Council for higher

[56] Giovanni GUIGLIA, "The Opportunities of the European Social Charter (in Italy)." http://www.europeanrights.eu/public/commenti/The_opportunities_of_the_ESC_in_Italy_-_Giovanni_Guiglia.pdf (last accessed 28 February 2020).
[57] ECSR, *Confédération française de l'encadrement v. France,* Complaint No. 9/2000, 16 November 2001, §26-27.
[58] Ibid., with the partial dissenting opinion of Mr. Evju Stein, joined by Rolf Birk.
[59] Ibid.
[60] Ibid., §40.

education and research.[61] The Committee dismissed the argument stating that "Article I provides for the means of implementing the different provisions of the Charter. It can therefore not as such lead to a violation."[62] As Cullen summarizes, "[a]n attempt to use Article I as the basis for a violation was rejected on the ground that it is an interpretative principle not a right".[63] Yet, the Committee's statement deserves a closer look. In a single sentence, the Committee in 2004 dismissed the idea that article I could "as such lead to a violation". It is fair to say that article I is "an interpretative principle" and "not a right", but it would be inaccurate to conclude that state responsibility could not arise because states insufficiently considered article I. The Committee's statement appears too dismissive because a breach of an international obligation, as defined in the law of state responsibility for internationally wrongful acts, always arises "when an act [or omission][64] of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character". Hence, rather than stating that article I can never be the basis for a violation, it would have been preferable to indicate that in the relevant complaint, insufficient arguments were made that the only effective way to implement articles 5 and 6 ESC (i.e. the substantive provisions) would be for France to grant legal remedies to trade unions to challenge elections. In combination with another provision, article I can be violated.

The purpose and importance of article I lies in its potential to impact the concrete implementation of the Social Charter at the domestic level. Article I helps define the ways in which states must implement the substantive provisions. In so doing, it facilitates and legitimizes the monitoring of the domestic implementation by the respective supervisory organs both at the national level and within the Council of Europe and it socializes and supports domestic actors, and notably domestic law-makers.

Biographical note

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[61] ECSR, *Syndicat des agrégés de l'enseignement supérieur (Sages) v. France,* Complaint No. 26/200, 15 June 2005, §6 and §§17-19.
[62] Ibid., §32.
[63] Holly CULLEN, *op. cit (n.55)*., p. 84, fn 153.
[64] ILC Articles on State Responsibility, Annex to GA Res. 56/83, 12 December 2001, Commentary to art. 1, §1.

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