THE PERSONAL SCOPE OF THE EUROPEAN SOCIAL CHARTER: QUESTIONING EQUALITY

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SUMMARY: 1. *Charta locuta causa finita?* – 2. The exclusions set forth in the Charter. – 3. Some doctrinal attempts to bypass them. – 4. The (quasi-)judicial activism of the European Committee of Social Rights. – 4.1. Unlawful residence, basic needs, and human dignity. – 4.2. Citizenship and data collection. – 4.3. Minority of workers and State obligations. – 5. Concluding remarks.

1. Charta locuta causa finita?

One of the most relevant differences between the European Convention on Human Rights (ECHR) and the European Social Charter (ESC) is their personal scope. This is a key point for the implementation of the two sister charters at national level, although its importance is generally underestimated by scholars.

The difference is, first of all, stylistic. Article 1 of the ECHR states:

> The High Contracting Parties will secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention (emphasis added).

Conversely, the first paragraph of the Appendix to the ESC clearly specifies 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 (emphasis added).
> 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*! However, in my view, the matter is far from over, for several reasons.

First, being a human rights treaty (moreover, a 'European' treaty)[2] and concerning basic needs and primary goods of the person, the Charter shares

[1] This text is a shorter and updated version of the paper originally appearing in *Revista europea de derechos fundamentales*, 2014 (24), pp. 51 ff.

the openness to universalism peculiar to all similar declarations. The 'indivisibility' and 'interdependence' of human rights, to which the European Committee of Social Rights (ECSR) often refers, would mean very little if not complemented by the acknowledgement of their 'universality' and 'intergenerationality', as theoretical preconditions for effective protection.[3]

Second, the context in which the Charter operates – a set of overlapping and interrelated legal systems in the same geographical area; that is the Council of Europe (CoE), the European Union (EU), and national 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 ESC revision in 1996 was a good chance to reformulate the Appendix, but it did not happen. Since no change is likely in the near future, the 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 life of people moving across or establishing themselves in Europe.

This chapter first addresses the restrictions set forth in the Appendix and the plausible reasons for them; it also aims to verify if these reasons are still valid today. Second, it analyses some theoretical attempts developed to bypass the mentioned restrictions. However, the central theme focuses on ECSR's contribution in this specific field, a perspective which highlights the key role of the collective complaints procedure (CCP) in fostering a dynamic and up-to-date reading of the Charter as a 'living instrument'. The last part outlines some conclusive remarks expressing the author's viewpoint on the main issues at stake.

2. The exclusions set forth in the Charter

In short, under the Charter, each Member State has an obligation to assure to certain people the enjoyment of the rights protected. These people are: (*i*) State's own citizens; (*ii*) other Parties' nationals lawfully resident in its

[2] This feature has significant effects on the construction of Charter provisions: the ECSR usually takes account of the 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. This stance is fully consistent with the ECSR preference for a teleological approach and a systematic reading of the Charter, through which the Committee seeks to give 'full life and meaning' to the rights enshrined therein, in light of all other relevant international norms and standards.

[3] The Vienna Declaration, adopted in 1993 by the UN World Conference on Human Rights, solemnly affirms that: "All human rights are universal, indivisible and interdependent and interrelated" (Part I, no. 5).

territory; (*iii*) other Parties' nationals regularly working in its territory; and (*iv*) refugees and stateless persons legally resident in its territory, as far as they are protected by the relative international treaties.

Conversely, the Charter's provisions should not apply to: (*a*) *third-State* nationals; (*b*) other Parties' nationals *unlawfully present* in the territory of the State; (*c*) refugees and stateless persons *not* complying with the above conditions. Moreover, a fourth exclusion indirectly originates from Article I, paragraph 2 of the revised Charter (corresponding to Article 33 of the ESC), by which States' compliance with several undertakings of the Charter "shall be regarded as effective if the provisions are applied ... to the great majority of the workers concerned".[4] Consequently, a *minority* group of workers might not be protected.

The mentioned exclusions appear *differentiated* (as to the persons affected) and *selective* (as to the provisions concerned). Several reasons concur to explain the Charter's 'anomaly' among international human rights documents.[5]

Regarding third-State nationals, for example, it is likely that the signing States were unwilling to engage themselves in granting welfare benefits to 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'.

The second and third exclusions (foreigners, refugees, and stateless persons in unlawful condition) relate to the fact that the Charter was originally intended to pursue a common standard of social protection as to how Member States should treat their *own* citizens, primarily in a labour context. The few exceptions provided for in Articles 12, para. 4, 13, para. 4, 18, and 19

[4] The concerned provisions refer to the following rights: just conditions of work (Art. 2, except para. 6), protection of children and young persons (Art. 7, paras 4, 6, 7), vocational training (Art. 10, except para. 4), information, consultation and participation of workers (Arts 21 and 22).

[5] See, for all, the 1966 UN Covenant on Economic, Social and Cultural Rights, which refers generally to 'everyone' (esp. in Part III). Even the ECSR has emphasized the aforesaid 'anomaly' in its *Conclusions 2011*, 16. However, the main incongruity regards basically 'lawfully resident' foreigners, whereas international norms are usually less sensitive towards the protection of 'irregular' migrants: see G. PALMISANO, *Trattamento dei migranti clandestini e rispetto degli obblighi internazionali sui diritti umani*, in *Diritti umani e diritto internazionale* 2009 (3), pp. 509 ff. As to EU law, there are at least 20 different legal statuses regarding third-State nationals, on the basis of the length of residence permits or by virtue of the specific legal protection claimed: for an overview, see the EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS – COUNCIL OF EUROPE's *Handbook on European Law Relating to Asylum, Borders and Immigration*, 2014, p. 14, table 1; for a deeper (though less recent) insight, see E. GUILD, *Who is an Irregular Migrant?,* in B. BOGUSZ, R. CHOLEWINSKI, A. CYGAN AND E. SZYSZCZAK (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden, 2004.

confirm the idea of a limited mobility inside the borders of 1960s' Europe, justified more by the search for long-term jobs than by some 'welfare tourism' trend.[6] National communities appeared to be somewhat *static* to the ESC framers. Social protection of foreigners was deemed a matter of real importance only insofar the foreigners had established a deep and durable linkage within the Parties' territory, as proved by the use in the Appendix of the terms 'lawfully resident' and 'working regularly'. It is also worth remembering that the principle of non-discrimination among Member States' nationals was a milestone in European Community law and the basis for the establishment of the Common Market.[7]

The last exclusion (the *minority* of the workers concerned) resembles a sort of 'safeguard clause' on which Member States could rely in case of alleged failure to comply with Charter's obligations *under the reporting procedure*. In this sense, the exclusion stems from a realistic approach to the matter, and it was probably required to achieve a consensus on the articles concerned by the signing Parties. Nonetheless, this restriction goes far beyond the 'progressiveness' principle that characterizes the implementation of many social rights,[8] and underpins 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 the margin of appreciation by each State might easily result in a breach of the equality principle (Article E of the Charter),[9] and generate a paradoxical, quite absurd, effect of 'legalized discriminations'.

[6] The cited exceptions regard, respectively, the equal treatment clauses between citizens and other Parties' nationals as to social security rights (Art. 12. para. 4) or for social and medical assistance (Art. 13, para. 4), the freedom of a Party's nationals to engage in a gainful occupation in the territory of another Party (Art. 18) and the protection of migrant workers and their families (Art. 19).

[7] See Art. 48, para. 2, of EEC Treaty, progressively implemented during the 1960s 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.

[8] For example, Art. 2, para. 1, of the 1966 UN 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 and budget constraints are all rhetoric arguments to which courts, as well as the ECSR, usually refer. For instance, in deciding the complaint no. 58/2009 (see more details in section 4.2.), the Committee 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'" (*ibidem*, para. 27).

[9] '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'.

Although plausible in 1961, these reasons are considerably weaker today. The first three exclusions – a part from the ambiguities in the CoE legal system – appear to conflict with recent developments in international, EU, and national law. For instance, under the International Labour Organization (ILO) Convention no. 143/1975, a migrant worker in an *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 benefits" (Article 9, para. 1).[10] As to the EU law, not only does it provide equal treatment between all regular workers, third-State nationals included, but also, by virtue of a dynamic interpretation of EU citizenship, the European Court of Justice (ECJ) has in some cases extended the right to residence (with subsequent social entitlements) to even inactive third-State nationals.[11] Moreover, national States often grant basic social rights (health care, education, shelter, and the like) to unlawfully resident foreigners. Finally, the minority of workers' exclusion, as noted above, appears questionable when compared with the developments of the 'equality' principle in contemporary constitutional States.

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

3. Some Doctrinal Attempts to Bypass Them

Before addressing the last question, it is appropriate to discuss some theoretical alternatives to a formal amendment of the Appendix, which indeed appears to be harder today than when the Charter was revised in the mid-1990s (also because of the austerity measures generally adopted by several European States to tackle the current global economic crisis).

The first possibility relies on the paragraph of the same Appendix which allows the Parties to extend "similar facilities to other persons". On this basis, 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 provi-

[10] 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 UN General Assembly on 18 December 1990 (Resolution no. 45/158).

[11] As in the case of the parents of EU minor children citizens: see for all ECJ (GC), judgment of 8 March 2001, case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124. For a more restrictive approach, however, see the recent judgments of 11 November 2014, case C-333/13, *Dano*, ECLI:EU:C:2014:2358 and 15 September 2015, case C-67/14, *Alimanovic*, ECLI:EU:C:2015:597.

> sions 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.[12]

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 acknowledgement cannot go further than the 'certain *specific* situations' conceived by the Committee.[13] In any case, even more favourable national legislation might not mechanically widen Charter's obligations, nor broaden ECSR jurisdiction.

The second alternative to a formal revision of the Appendix would be to replicate for the Committee the same scheme that allowed the European Court of Human Rights (ECtHR) to extend its jurisdiction under the non-discrimination principle (Article 14 of the ECHR) over the rights granted by the legislation of each Party.[14] Similarly, on the basis of the above-cited paragraph, the Committee could expand its control over national discriminatory treatments affecting foreigners, even outside the Charter's domain. This hypothesis is quite fascinating but, theoretical ambiguities apart,[15] it is at odds with what the *Explanatory Report* to the revised ESC clearly states on the point: namely, that Article 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.

The 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,[16] the initiative has not yet given the expected results, having been formally rejected by Lithuania and the Netherlands. According to the incumbent ECSR President, the major difficulty probably lies in the wideness (and vagueness) of the proposed

[12] ECSR, *Conclusions 2004*, Statement of interpretation, p. 10.

[13] In this sense, see also J.-F. AKANDJI-KOMBÉ, *L'applicabilité* ratione personae *de la Charte sociale européenne: entre ombres et lumières*, in O. DE SCHUTTER (ed.), *The European Social Charter: a Social Constitution for Europe/La Charte sociale européenne: une constitution sociale pour l'Europe*, Bruxelles, 2010, pp. 83 ff., p. 84.

[14] See Art. 1 of the 1998 Protocol no. 12 to the ECHR.

[15] It is worth stressing that, while the EctHR jurisdiction was enlarged *ratione materiae*, the ECSR control would expand *ratione personae*: this passage should be adequately justified.

[16] The idea was initially launched by ESC Executive Secretary (see R. BRILLAT, *The European Social Charter and Monitoring its Implementation*, in N. ALIPRANTIS, I. PAPAGEORGIOU (eds), *Social Rights. Challenges at European, Regional and International Level*, Bruxelles, 2010, pp. 55 ff.) and then sponsored by the ECSR, which also prepared a model for the declaration: see *Conclusions 2011*, Personal Scope of the Charter, pp. 16-17.

formula, which does not cover only foreigners lawfully resident in the territory of a Party, but also "every individual under its jurisdiction".[17]

Aside from these overarching alternatives, other interpretative routes have been suggested in narrower contexts. Most interesting is the one based on the part of the Appendix that specifies that the extension of Charter's provisions to foreigners (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 corresponding rights of Part I (which 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 for them a more favourable treatment than that usually provided for in national immigration laws.[18]

4. The (Quasi-) Judicial Activism of the European Committee of Social Rights

It is now time to turn to the Charter's guardian, the ECSR, whose contribution on the issue at stake is decisive.

Indeed, during the last years, 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.[19] However, more practical consequences, in a *quasi-judicial* perspective, come 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, which share a common set of interpretative standards and principled arguments. The first group of decisions directly addresses the issue of 'unlawful' stay, regardless of national membership which is instead the topic of the second group. The third group deals with the 'majority of workers' clause.

4.1. Unlawful Residence, Basic Needs, and Human Dignity

The mainstream is laid down in the *FIDH* case, which concerns a State's obligation to grant medical assistance to irregular foreign minors. The decision very quickly became a precedent for subsequent cases.[20]

[17] See G. PALMISANO, *Overcoming the Limits of the European Social Charter in Terms of Persons Protected: the Case of Third State Nationals and Irregular Migrants*, 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 XXI^e siècle*, Napoli, 2014, pp. 181 ff.

[18] For this thesis see, in more detail, AKANDJI-KOMBÉ, *op. cit*., esp. pp. 87-91.

[19] For its incisive tone, see again ECSR, *Conclusions 2011.*

[20] ECSR, decision on the merits of 8 September 2004, complaint no. 13/2003, *International Federation of Human Rights Leagues (FIDH) v France*.

Its reasoning 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 Laws 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"; (*iii*) the Charter complements the ECHR and it is 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".[21]

On the basis of these assumptions the ECSR held that a "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". According to the Committee, in the *FIDH* case the restriction provided for in the Appendix affected "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".[22]

Thus, notwithstanding that rule, irregular foreigners *are not completely excluded* from the entitlements embodied in the Charter. Other decisions followed on the same line of argument.

In the *DCI v the Netherlands* complaint (again focusing on minors' protection), the Committee declared the partial infringement of the right to housing embodied in Article 31, although limited to the 'immediate shelter' guarantee (under States' undertakings to prevent, reduce, and gradually eliminate homelessness) and not in respect of the right to 'adequate housing'.[23]

It is also noteworthy what the respondent government argued on the point: immigration policy (who may legally enter and reside in the territory) is a State's own responsibility, whereas the obligation to grant irregular immigrants with housing or other social entitlements would likely boost illegality and thus "frustrate the right of the State to control immigration".[24]

The objection goes straight to the core of the matter. It implies the fear that a *judicial* extension of the Charter's 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 whether it could be reconciled with the universal nature of human rights and the corre-

[21] *Ibidem*, paras 26-29.

[22] *Ibidem*, paras 30-31.

[23] ECSR, decision on the merits of 20 October 2009, complaint no. 47/2008, *Defence for Children International (DCI) v the Netherlands*, paras 42-48, 63-71.

[24] *Ibidem*, paras 31, 54.

spondent expansive force of the international norms protecting them (the ESC included)?

As a matter of principle, the Committee appeals to the need for a reasonable balance between the State's interest in contrasting illegal immigration and the protection of fundamental rights (with due reference to the ECtHR case-law).[25] In practice, the ECSR carries on a restrictive construction of the Appendix. After recalling its prior assessments about the Charter as a 'living instrument', the teleological approach, and the consistency with other international human rights treaties, the Committee makes a new crucial statement: even though affecting various rights in different ways, the restrictions of the Appendix "should not end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake".[26]

The step forward is remarkable. While the previous decision (*FIDH*) focused on the fundamental rights and the basic needs of single persons, in the instant case the reasoning *shifts from the 'individual' and his rights to the 'group' and its vulnerability*. This offers a further legitimate basis 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*.

The ECSR sharpened its reasoning in recent cases. In *FEANTSA v the Netherlands* and in *CEC v the Netherlands*, the Committee challenged the use of 'local connection' criteria by national authorities when this might negatively affect fundamental rights related to the basic needs of the persons concerned (which included irregular *adults*), such as the right to shelter or to emergency assistance. In such cases, "no conditions on the length of presence on the territory of the State Party in question may be set". Moreover, notwithstanding the functions of local authorities or the subsidiary actions of private associations in the mentioned fields, "the States Parties remain responsible under their international obligations to ensure that their responsibilities are properly exercised".[27]

Finally, a very important decision was rendered in *DCI v Belgium*. The complainant framed the status of foreign irregular minors in the widest context of rights and guarantees available (Articles 7, para. 10, 11, 13, 16, 17, and 30, read alone or in conjunction with the non-discrimination principle of Ar-

[25] *Ibidem*, para. 42.

[26] *Ibidem*, para. 37.

[27] ECSR: decision on the merits of 2 July 2014, complaint no. 86/2012, *European Federation of National Organisations working with the Homeless (FEANTSA) v the Netherlands*, paras 112, 126, 141, 185-186; decision on the merits of 1 July 2014, complaint no. 90/2013, *Conference of the European Churches (CEC) v the Netherlands*, paras 105, 118-119, 135-145. The two decisions also rejected the government's argument that extending social benefits to irregular foreigners would encourage illegal migration and thus frustrate the State's own policies (*FEANTSA*, cit., paras 169-172, 181-183; *CEC*, cit., paras 121-123).

ticle E), so that several and rather exclusive State policies were also affected (childhood, family, poverty and the like).[28] The little crack opened in the wall of the personal scope of the Charter could become a large breach.

Leaving aside the findings on the merits,[29] two important statements concern the personal scope of the Charter. First, when interpreting it 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". Second, the application of the Charter beyond the limits of the Appendix is and has to remain 'entirely exceptional', that is justified by 'serious threats' of detrimental effects on fundamental rights of the persons concerned (such as the right to life, to physical and moral integrity, to health).[30]

The two points highlight the Committee's awareness of the ambivalent implications deriving from the new trend and, hence, the need for more solid textual and normative grounds.

4.2. Citizenship and Data Collection

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

In 2004, the *European Roma Rights Centre* (*ERRC*) lodged a complaint against Italy alleging violation of Articles 31 and E, in the legislation on Roma camping sites.[31] The Italian government argued that the majority of Roma people were simply outside the personal scope of the Charter (being third-State nationals or otherwise unlawful residents), and that in any event it was impossible to distinguish who in the Roma population met the requirements of the Appendix from those who did not.

The answer sounds simple and clear: "[e]ven assuming that ... the Committee does not see how such a circumstance would exempt the State from the obligation of ensuring that protection". Moreover, when they impact adversely on vulnerable groups (such as Roma minorities), differential legal

[28] ECSR, decision on the merits of 23 October 2012, complaint no. 69/2011, *Defence for Children International (DCI) v Belgium*.

[29] *Ibidem*, the Committee declared the infringement of Art. 17 (protection of children: paras 68-83), Art. 7, para. 10 (minors protection against exploitation: paras 84-86), Art. 11 (access to health system: paras 99-102), Art. 13 (medical assistance: paras 119-122) and Art. 16 (decent housing for families: paras 133-136), but not of Art. 30 (protection against poverty and social exclusion: paras 143-147). For an in-depth analysis, see PALMISANO, *Overcoming the Limits...*, cit.

[30] *DCI*, cit., paras. 29, 35–36.

[31] ECSR, decision on the merits of 7 December 2005, complaint no. 27/2004, *European Roma Rights Centre* (*ERRC) v Italy*.

treatments are *suspect* and make national authorities responsible for collecting and updating data on the situation (the first step in 'formulation of rational policy'), and make it incumbent on national authorities to prove that all adequate and possible measures have been taken against the risk of discrimination.[32]

According to the Committee, this means that when it is impossible to distinguish among individuals within the same group, the interpretation more favourable to the person (*favor personae*) should be followed, so that the Charter's guarantees are applied rather than denied.[33] The Appendix has a new crack.

A firm restatement of this principle comes from a second decision against Italy delivered few years later.[34] According to the Committee, Italian legislation has not only breached several Charter's provisions (Articles 16, 19, paras. 11, 4(c) and 8, 30, and 31), but the status of the Roma and Sinti has deteriorated since the prior assessment in *ERRC* to such a degree that it potentially undermines the fundamental values shared by all Member States and the respect of which is a precondition to participation in the Council of Europe system.[35]

As to its moral strength and persuasive impact on public opinion, this last decision is very similar to the ECtHR judgments that assess 'structural infringements' of the Convention, although it does not share the same legal binding effects.

[32] *Ibidem*, paras 18, 23-24. The ECSR has developed a steady interpretative trend against the discrimination of vulnerable groups: see M. BELL, *Combating Discrimination through Collective Complaints under the European Social Charter* and O. DE SCHUTTER, *La contribution de la Charte sociale européenne à l'intégration des Roms d'Europe*, both in DE SCHUTTER (ed.), *The European Social Charter ....* cit., pp. 39 ff. and pp. 49 ff. For the treatment of the Roma and Sinti minorities according to Italian law, see P. BONETTI, A. SIMONI, T. VITALI (eds.), *La condizione giuridica di Rom e Sinti in Italia*, 2 vols, Milano, 2011.

[33] On the merits of the *ERRC* case, the Committee found a violation of Art. 31, in conjunction with Art. E, in relation to the right to adequate housing (paras 35-37), to protection against forced and unjust evictions (paras 41-42) and to social housing for disadvantaged groups (paras 45-46).

[34] ECSR, decision on the merits of 25 June 2010, complaint no. 58/2009, *Centre of Housing Rights and Eviction (COHRE) v Italy* (for a comment, see G. GUIGLIA, *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 *www.rivistaaic.it*, 2011 (3), (accessed 29 January 2016), but see also decision on the merits of 28 June 2011, complaint no. 63/2010, *Centre of Housing Rights and Eviction (COHRE) v France*, paras 32, 53-54, 62-79.

[35] *COHRE v Italy*, cit., paras 77-78. The Committee also reaffirms that a State's 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 the denial of basic rights connected to life and dignity to those who fall out the definition of the Appendix (paras 32-33); similarly, ID., decision on the merit of 11 September 2012, complaint no. 67/2011, *Médecins du Monde-International v France*, paras 33-34.

4.3. Minority of Workers 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 to be around the 80 per cent mark. However, if the possibility of depriving the residual minority of Charter entitlements might be somehow tolerated in the reporting system, this is not consistent with the purpose of the CCP.[36]

Two decisions clearly refer to this point: *Confédération Française de l'Encadrement CFE-CGC v France*[37] and *STTK ry and Tehy ry v Finland*.[38]

In the first case (reduction of working time to 35 hours per week: 'Aubry II' Act), the French government argued that the specific provisions contested – those applying to managers only – covered just 5 per cent of all the workers concerned, so that, in the light of Article I, no breach of Charter obligations had occurred. The Committee held that, on the contrary, the rule in Article I could not lead to the deliberate exclusion of "a large number of persons *forming a specific category*" from the scope of the Charter. Thus, it found that "the excessive length of weekly working time permitted" by the French legislation violated Article 2, para. 1.[39]

It is likely to agree with this result. But the decision does not explain the background of the 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, consideration of the *total number* of them. No surprise that some ECSR members dissented from the decision.

The second case (*STTK ry and Tehy ry v Finland*), concerning the additional benefits for unhealthy and dangerous occupations, is slightly different in that only 10 per cent of workers were involved. The respondent government did not invoke the clause of the 'majority' of workers concerned, nor did the Committee when it declared a violation of Article 2, para. 4 of the Charter. According to some authors, this might be a signal that, at least in the CCP, the restriction in Article I can be simply ignored if no party formally appeals to it.[40] Should the Committee confirm this hypothesis in the future, it would be a further blurring of the Charter's edges.

[36] See also J.-F. AKANDJI-KOMBÉ, *L'applicabilité* ratione personae... , cit., p. 91.

[37] ECSR, decision on the merits of 16 November 2001, complaint no. 9/2000, *Confédération Française de l'Encadrement CFE-CGC v France*.

[38] ECSR, decision on the merits of 17 October 2001, complaint no. 10/2000, *STTK ry Tehy ry v Finland*.

[39] *CFE-CGC v France*, cit., paras 38-41 (emphasis added).

[40] See again J.-F. AKANDJI-KOMBÉ, *L'applicabilité* ratione personae... , cit., p. 92.

5. Concluding Remarks

The introduction in 1995 of the CCP gave the Charter a *second life*, which began with the adoption of the revised version in 1996.[41] Under the complainants, pressure, the Committee has enriched the trends arising from the reporting system, and sharpened its interpretative techniques. It is as if new fuel has been pumped into the engine of the 'European social democracy pact'.[42]

The CCP matches perfectly with the reporting procedure: each mechanism offers the chance for a subsequent review of States' follow-up to Committee's conclusions and decisions.[43] Under this double, mutually strengthening, control system, social rights may become more effective. To this end, *national judges* could play a crucial role too in enforcing the Charter, if they were to take more account of the Committee's 'jurisprudence'.[44]

Regarding the personal scope of the Charter, the case study shows how often the CCP has cast light on national situations that otherwise would have probably been ignored under the reporting system. The preference for a reading *magis ut valeant* of ESC provisions, even beyond the Appendix' literal terms, allowed the Committee to avoid the paradox of setting aside the Charter just when its protection is needed most (it was the case of foreign unaccompanied minors, or ethnic minorities like Roma and Sinti) or making the remedy provided for almost useless (case of the minority of the workers concerned).

[41] See O. DE SCHUTTER, *The Two Lives of the European Social Charter* and C. O'CINNEIDE, *Social Rights and the European Social Charter – New Challenges and Fresh Opportunities*, both in DE SCHUTTER (ed.), *The European Social Charter...*, cit., pp. 11 ff. and 167 ff., respectively.

[42] This definition of the Charter is borrowed from L. JIMENA QUESADA, *La Carta social europea y la Unión europea*, in *Revista europea de derechos fundamentales*, 2013 (13), pp. 389 ff., p. 391.

[43] Sometimes, the decisions delivered in the CCP are referred to 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 L. JIMENA QUESADA, *Interdependence of the Reporting System and the Collective Complaint Procedure: Indivisibility of Human Rights and Indivisibility of Guarantees*, in M. D'AMICO AND G. GUIGLIA (eds), *op. cit*., pp. 143 ff.

[44] In favour of a direct application of the Charter in national legal systems, see in general L. JIMENA QUESADA, *Jurisdicción nacional y control de convencionalidad. A propósito del diálogo judicial global y de la tutela multinivel de derechos*, Cizur Menor, 2013; for specific case law in several European countries, see instead: G. GUIGLIA, *The Opportunities of the European Social Charter (in Italy)*, in *www.europeanrights.eu*, 2011 (accessed 29 January 2016); J.-F. AKANDJI-KOMBÉ, *De l'invocabilité des sources européennes et internationales du droit social devant le juge interne*, in *Droit social*, 2012 (10-11), pp. 1014 ff.; M.C. SALCEDO BELTRÁN, *Incumplimiento por España de los tratados internacionales: Carta Social Europea y período de prueba (A propósito de la SJS nº 2 de Barcelona de 19 de noviembre de 2013)*, in *Revista de derecho social*, 2013 (64), pp. 119 ff.

Committee decisions quite often appeal to universal enjoyment of 'elementary' rights, that is those rights closely related to human dignity, the real *Grundwert* of all the European multilayered guarantees system.[45] In fact, the implicit distinction between rights of more or less 'importance' must not be made dogmatically: each and every right embodied in the Charter is fundamental and, together with those enshrined in the ECHR, form a unique *bloc de constitutionnalité*. That distinction serves 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 use of the 'essentialist' argument reflects the Committee's hermeneutic pre-understanding of the topic of human rights. It relies on two pivotal assumptions: (*a*) all fundamental rights, including social rights, pertain to 'human beings' and not only to 'citizens'; consequently, (*b*) it is the restriction of rights to citizens, rather than their extension to foreigners, that ought to be legally justified.

Of course not all differentiations are, in effect, *unlawful* discriminations. The Appendix states: "A differential treatment based on an objective and reasonable justification shall not be deemed discriminatory."[46] 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 example, that citizenship or lawful residence may constitute valid grounds for differential treatments.[47] But, on the other hand, it has been also emphasized that Article E prohibits *indirect* discrimination 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".[48]

In any event, the Committee has shown an advanced and very bold mindset when dealing with immigration problems, and it did not fail to censure controversial States' policies even if they were shared by relevant sectors of national public opinions. This attitude serves as an *external* bulwark against

[45] In addition to the mentioned case law, see also the latest ECSR's *Activity Report 2013*, Statement of interpretation on Article 31 §1 and 31 §4, pp. 30-31.

[46] Moreover, the Explanatory Report to the revised ESC states that "[w]hereas 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).

[47] *DCI v the Netherlands*, cit., para. 73; *DCI v Belgium*, cit., paras 149-150.

[48] See, *inter alia*, ECSR: decision on the merits of 4 November 2003, complaint no. 13/2002, *Association international Autisme-Europe v France*, para. 52; decision on the merits of 8 December 2004, complaint no. 15/2003, *ERRC v Greece*, para. 19; *ERRC v Italy*, cit., para. 20; decision on the merits of 8 October 2006, complaint no. 31/2005, *ERRC v Bulgary*, para. 40.

high-impacting media policies that result in social exclusion and discriminatory treatments of individuals as well as of entire groups. By its action, the Committee also supports national courts' efforts to restore from *inside* the rule of law.[49]

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 social inclusion. The role of the Committee is thus even more crucial, with it being the only guardian *fully specialized* in the protection of social rights at European level. Indeed, although the ECtHR and the ECJ have made remarkable progress, until now these courts have not been as responsive as the Committee on this field.[50] Nonetheless, no hierarchy should be established between the mentioned bodies: on the contrary, it is vitally important to develop a suitable theory of interwoven, complementary and subsidiary guarantees.[51]

The flexible approach followed by the Committee also 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 and its functioning,[52] but it also relies on the ability of the Committee to became increasingly independent from the will of the Charter's authors (national States as traditional 'lords of the treaties', *Herren der Verträge*) by fostering its own autonomous and dynamic interpretation of the text, something that is indeed happening.

So, *not only a Committee but not yet a Court*? The question is actually more complex. Welfare choices affect the *political* dimension of a community, that is citizenship's boundaries and shared participation. By virtue of EU law, in many European countries 'lawful residence' is replacing citizenship as the chief prerequisite for social entitlements. However, due to the 'representation paradox',[53] the claims relating to social rights often bear upon the judiciary,

[49] For example, the Italian Constitutional Court has held several national and regional statutes to be unconstitutional, on the basis that they unreasonably subordinated the enjoyment of social benefits by non-EU immigrants to prerequisites that were included as substantial content of the benefits claimed (see, *inter alia*, judgements nos 306/2008, 11/2009, 187/2010, 329/2011, 222/2013, 168/2014).

[50] See, amongst others, L. MOLA, in this volume.

[51] For a deeper consideration of this key point, and further references, see C. PANZERA, *Per i cinquant'anni della Carta sociale europea*, in *Lex Social*, 2013 (1), available at *www.lex social.es* (accessed 29 January 2016).

[52] See, *inter alia*, B. BOISSARD, *La contribution du Comité europèen de droits sociaux à l'effectivité des droits sociaux*, in *Revue de droit public et de la sciences politique en France et à l'Etranger*, 2010 (4) pp. 1083 ff.

[53] Those excluded from the boundaries of political membership have no chance to take part in formulating the criteria of inclusion/exclusion. For a theoretical discussion of this point, see S. BENHABIB, *The Rights of Others. Aliens, Residents and Citizens*, Cambridge, 2004, p. 177.

whose reforming action is generally curbed by the structural limits of judicial powers.

In this tangled and fluid context of mixed democratic majoritarian policies and constitutional judicial guarantees, it is 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 to pursue 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 academic congresses, debates and meetings on social rights topics, and by promoting the Charter and its values among non-signatory States.

Of course, to make social rights and values more effective at European level would at least require: (*a*) a less restrictive reformulation of the Appendix and an overall update of the Charter's provisions; (*b*) the accession of EU to the Charter, in parallel to its accession to the ECHR;[54] (*c*) making the Committee's decisions legally binding.

In the meantime, it is unquestionable that the Committee has well served the fundamental demand for equity and justice often arising from those who live at the edge of our societies.

[54] On this recurrent issue, see now J. LUTHER, in this volume.