

Training and awareness raising event

“HOW TO MAKE THE BEST USE OF THE COLLECTIVE COMPLAINTS PROCEDURE UNDER THE EUROPEAN SOCIAL CHARTER”

Brussels, 22 September 2015

“Towards an enhanced implementation of the Collective Complaints Procedure: a key objective of the Turin process”

Text of the intervention of:

Mr Michele Nicoletti, Vice-President of the Parliamentary Assembly of the Council of Europe – General Rapporteur of the High-Level Conference on the European Social Charter (Turin, 17-18 October 2014)

- *Check against delivery* -

Ladies and Gentlemen,

It is a great pleasure to take the floor on the occasion of the first training event organised in the framework of the Turin process.

I believe that this morning's previous interventions clearly confirmed, in case it were necessary, that the collective complaints procedure represents an extremely useful instrument for upholding social rights in Europe.

However, despite its usefulness - for a number of reasons that I shall attempt to summarise during my intervention - since its adoption in 1995 the collective complaints procedure has not been recognised by the contracting parties to the European Social Charter as the primary instrument for monitoring the implementation of this fundamental treaty of the Council of Europe (a total of twenty eight out of forty-three countries have not yet accepted it).

As you know, the Turin process aims to promote the opportunity that the collective complaints procedure presents for the direct involvement of NGOs and social partners in the monitoring activities of the Charter, and to highlight the fact that it represents in this sense a more transparent, open and democratic system as compared to the one based on national reports.

The complaints procedure represents a non-paternalistic system to monitor the implementation of social rights. These rights belong to citizens and are an expression of their humanity as members of a community. In a democratic system, rights and claims must be connected; the exercise of these rights cannot be achieved without providing a suitable mechanism for immediate reaction in case of violations. As explained by Joel Feinberg, "... respect for persons may simply be respect for their rights, so that there

cannot be the one without the other; and what is called 'human dignity' may simply be the recognisable capacity to assert claims"¹. If we consider the case of the European Social Charter, the essential link between rights and claims is ensured by the collective complaints procedure. In this framework, non-governmental organisations render a genuine *democratic service* to European societies.

If the collective complaints procedure was accepted by more States - only 15, as we have heard, have accepted the relevant Protocol so far - this could help to reduce the number of pending cases before the European Court of Human Rights.

We also know that in comparison with applications before the Court, complaints before the European Committee of Social Rights are processed more quickly, can be lodged by parties who are not necessarily victims of the alleged violation, but represent those affected, and do not require complainants to have exhausted domestic judicial remedies.

However, these arguments do not appear sufficient to promote further acceptance of the collective complaints procedure.

One of the main ambitions of the Turin Process is to identify and overcome difficulties linked to the acceptance of the collective complaints procedure so that it can eventually express its full potential at the European level.

With reference to these difficulties, I will sum up the measures and proposals put forward within the framework of the Turin process, some of which have already been implemented, in order to relaunch the procedure that is advocated by many as the paramount system for monitoring the implementation of the Social Charter.

I believe that the primary obstacle to the acceptance of the collective complaints procedure is linked to the lack of full recognition of social rights within the Council of Europe. In other words, in spite of the solemn affirmation of the principles of the indivisibility, interdependence and interrelation of fundamental rights, the conception which views social rights as holding a position of inferiority compared to civil and political rights is still prevalent within the Council of Europe and reflected with regard to the monitoring systems of these rights.

In this respect, I think it is useful to retrace, albeit in broad terms, the evolution of the Social Charter in the framework of the Council of Europe, as well as that of the monitoring systems for its implementation at national level.

As is well known, the Council of Europe was set up in 1949, only a few months after the adoption of the Universal Declaration of Human Rights by the United Nations on 10 December 1948. The unity and indivisibility of fundamental rights are clearly recognised in this declaration, in their various dimensions: human, civil, political, social, economic and cultural. This unity and indivisibility have been constantly reaffirmed by the UN in the course of its history, as is evident from the Vienna Declaration of 1993:

¹ Cf. General Report of the High-Level Conference on the European Social Charter (Turin, 17-18 October 2014), Council of Europe - page 44.

“5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”.

The aim of the Council of Europe, as set out in Article 1 of the Statute, is *“to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress”.*

However, when it came to giving binding legal force to the rights in the Universal Declaration, the Council of Europe adopted two separate treaties, at an interval of about 10 years. It focused first on what are known as “civil and political” rights, which were incorporated in the Convention on Human Rights and in respect of which all individuals may submit applications to the Court if they believe that their rights have not been respected.

The Charter, in turn, was adopted in 1961. Even though the adjective ‘social’ appears both in the preamble and in Article 1 of the Statute of the Council of Europe, it took much longer to adopt a binding treaty on so-called economic and social rights than it did to adopt the Convention. The process of discussion may have been more difficult, but it could be seen as a positive aspect that it also involved the Assembly and social partners in deciding on its content.

The Charter sets out those human rights which are described as “economic and social” rights and does so in a solemn manner. However, even its name, “Charter”, has sometimes been seen as suggesting a difference between the fundamental rights it contains, and those of the Convention.

Moreover, it is not unusual for the term ‘human rights’ to be used solely to describe civil and political rights to the exclusion of the other components, in particular the Charter. These are mistakes which need to be remedied by means of appropriate communication. I will come back to this at the end of my intervention.

While the Convention was ratified progressively by all Council of Europe member States, a process which was completed by 1974 and was subsequently imposed on all new member states, for many years, the Charter remained the “poor relative” in terms of ratifications. However, it is reassuring that all the central European countries which have now joined the Council of Europe since 1990 have ratified the Charter (in most cases, the revised version) with varying speed. To date only Liechtenstein, Monaco, San Marino and Switzerland have not ratified the Charter.

The same observation applies to the supervisory procedure: all member States of the Council of Europe progressively accepted the compulsory jurisdiction of the Court, which became an integral part of the Convention under Protocol No. 11, which entered into force in 1998 and established the single, permanent Court.

In contrast, over 15 years after the procedure for collective complaints to the Committee came into force, only a minority of the States Parties to the Charter have decided to accept it.

In this respect, it is encouraging to note that on the occasion of the 50th anniversary of the Charter, in 2011, the Committee of Ministers of the Council of Europe adopted a solemn declaration reaffirming the principle established in Vienna in 1993 that all human rights are universal, indivisible, interdependent and interrelated.

In this connection, it reiterated its commitment to human dignity and the protection of all human rights and underlined the particular relevance of social rights and respect for them in times of economic difficulties, in particular for individuals belonging to vulnerable groups. In this respect, it should be noted the European Committee of Social Rights has taken a lead recently in ensuring that social rights are guaranteed to those most in need, and it has done so primarily through the collective complaints procedure.

In referring in the declaration to the paramount role of the Charter in guaranteeing and promoting social rights in Europe, the Committee of Ministers also expressed its resolve to secure the effectiveness of the Charter through an appropriate and efficient reporting system and, where applicable, the collective complaints procedure. It should not be forgotten that, in this framework, the Committee of Ministers has its own role to play through the adoption of Resolutions and Recommendations.

As mentioned before, there are other reasons which can explain the non-acceptance of the collective complaints procedure by the majority of contracting states, beyond the problems linked to the evolution of the Charter within the Council of Europe.

In this regard, I firstly would like to mention the difficulties encountered in the creation of a strong synergy between European Union law and the Charter.

It should be recalled that a number of divergences between the two normative systems were noted by the European Committee of Social Rights in the process of monitoring the application of the Charter on the basis of collective complaints in the period 2010-2013. The Committee noted that these divergences, relating to the national law of some States Parties adopted as an implementation of EU law, constituted a violation of these States' obligations under the Charter. It is also relevant to note that many of these issues stem indirectly from the EU legislation, which at times allows States to adopt measures which would contradict the rights of the Charter.

In addition to entailing violations of social rights at national level, these divergences do not facilitate the acceptance of the normative system of the Charter, including the collective complaints procedure, by several EU Member States.

In order to cope with these difficulties, it is urgent to establish a specific framework of co-operation between the Council of Europe and the EU aimed at improving the synergy between EU law and the Charter.

In this context, the Council and the European Commission, supported by the European Parliament – which, as you may know, a few days ago adopted a resolution significantly backing the normative system of the European Social Charter - could usefully

encourage the 14 EU member States which have not yet accepted the collective complaints procedure to do it at their earliest convenience.

A stronger commitment of all EU member states concerning the collective complaints procedure would help to ensure greater balance between EU members in terms of their obligations connected to the Charter, as the current difference between those which have accepted the procedure and those which have not would disappear.

In the same framework, the EU could usefully encourage its member States to harmonise their commitments, in particular by all ratifying the Revised Charter and all accepting all the provisions in the Charter which are most directly related in substance to the competences of the EU.

A second crucial factor for the incomplete affirmation of the collective complaints procedure is probably linked to the imbalance existing between the Charter's monitoring systems, more particularly in the means that the Contracting States currently have to deploy in order to ensure the proper functioning of the reporting system.

In this respect, it should be noted that given the unanimous agreement of the States Parties to the Charter, the Committee of Ministers decided in April 2014 that the reporting procedure for States Parties having accepted the collective complaints procedure should be simplified.

It is to be hoped that this change approved by the Committee of Ministers is only the beginning of a broader reform of the system for supervising application of the Charter so that it remains in line with the social and democratic needs of our times.

I wish to underline that it is of a paramount importance to continue the intergovernmental debate on the reform of the monitoring procedures of the European Social Charter.

This open reform process should be aimed at gradually reducing the reporting obligations of the States parties which have accepted the collective complaints procedure, in a manner which ensures their obligations are effectively supervised.

This would make the complaints procedure more attractive for States for different reasons.

The first is that it would make it possible to avoid a situation where, because of the limited number of States that have accepted the collective complaints procedure to date and the fact that the same States are also subject to the national reporting system, the combination of these two processes wrongly ends up putting more pressure on certain States, who have arguably done more to guarantee social rights, than on others.

The second is that broader acceptance of the collective complaints procedure would have the advantage of reducing the workload of the national administrative departments involved in the Charter's reporting system, by focusing on specific issues.

Thanks to increased acceptance or ratifications, in the long term, collective complaints could become the main procedure for monitoring the Charter's implementation by States parties. This would require, however, a concomitant increase in the number of collective complaints across the diverse areas covered by the Charter, to maintain and improve the proper observance of all the social rights it guarantees. Therefore the

continued engagement of non-governmental organisations is crucial in this regard, and there also needs to be wider awareness of the procedure.

In sum, with a reduced burden linked to the reporting system, the European Committee of Social Rights, supported by its secretariat, would have more time to examine complaints, search relevant information, establish a suitable dialogue with the parties and, at the end of the day, take even more considered decisions.

I would like to highlight the existence of another two factors that the Council of Europe needs to confront in order to achieve the objective of enhancing the collective complaints procedure.

First and foremost, there is the institutional strengthening of the body which supervises application of the Charter. There is an urgent need to consolidate the independence of the European Committee of Social Rights and authority. In the framework of a document on its own role and status, adopted by the Committee on the occasion of the High-Level Conference on the European Social Charter held in Turin in October last, an explicit request was made for Committee members to be elected by the Parliamentary Assembly of the Council of Europe, as provided for by the Protocol amending the Charter, adopted in 1991 (but not yet in force). There is not a shadow of doubt that such election would consolidate the democratic basis and independence of the body responsible for monitoring states' compliance with their obligations under the Charter.

The Committee took advantage of the adopted document to put forward two additional requests. The first was for the number of its members to be increased, with a view to better management of its growing workload, ensuring adequate representation of the diversity of legal approaches and social models which exist across the continent.

The second request was for the strengthening of the administrative structure of the Council of Europe responsible for assisting the Committee.

That request seems very much justified, bearing in mind the challenges to be faced and the surprising differences that exist in the treatment of the systems for monitoring fundamental rights within the Council of Europe Secretariat. In this respect, there is a need to increase the number of posts of specialist legal experts, and to ensure that the structure concerned can be acknowledged to have a place and a status commensurate with the fundamental nature of the rights safeguarded by the Charter.

The other challenge to be met in order to enhance the effectiveness of the collective complaints procedure, which I have already alluded to, relates to communication. It is vital in this context for the Council of Europe to convey a clear and conspicuous message as to the legal nature of the Charter, the scope of the Committee's decisions and the importance of the complaints procedure to the effectiveness of social and economic rights in Europe.

Thus the challenge that the Council of Europe must meet is that of designing and implementing specific communication on the Charter which is comparable to that dedicated to the European Convention on Human Rights, which is regular and

systematic and which, in particular, is proportionate to the importance that the Charter is acknowledged to have.

All of that would enable a number of inaccuracies and ambiguities which remain in circulation about the Charter, to the detriment of the achievement of the rights that it safeguards, to be eliminated.

In addition to the substantial progress which might be achieved through this proposal, the introduction of parallelism between the rights granted by the Charter and those granted by the European Convention in the communication sphere would enable the spotlight to be turned on the Council of Europe's role as the European guardian of the primary sources of European law relating to fundamental rights.