European Social Charter: discretion of the States

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Palais de l'Europe, Strasbourg

Seminar in honour of
Jean-Michel Belorgey, President of the European Committee of Social Rights (2002-2006) and General Rapporteur of the Committee
Csilla Kollonay Lehoczky and Andrzej Świątkowski, Members of the European Committee of Social Rights

Organised by the Council of Europe and the International Institute of Human Rights René Cassin under the auspices of the Andorran Chairmanship of the Committee of Ministers

Table of Contents

Programme

Seminar chaired by Jean-Paul Costa, President of the International Institute of Human Rights René Cassin

14.30 **Opening remarks**
Gabriella Battaini-Dragoni, Deputy Secretary General of the Council of Europe
Jean-Paul Costa, President of the International Institute of Human Rights René Cassin
S.E.M. Francesc Camp Torres, Minister of Tourism and Environment of Andorra

14h45 **The discretion of the States in choosing their commitments**
Peggy Ducoulombier, Professor, University of Perpignan, France

15h05 **The discretion of the States in the implementation of the rights**
Ineta Ziemele, Judge, European Court of Human Rights

15h25 *Break*

15h45 **The discretion of the States in achieving the compliance of national situations**
Christos Giakoumopoulos, Director, Directorate of Human Rights, Council of Europe

16h05 **Discussion**

16h50 **Concluding remarks**
Luis Jimena Quesada, President of the European Committee of Social Rights

17h00 *Reception*

Opening address

Gabriella Battaini-Dragoni, Deputy Secretary General of the Council of Europe

Minister, Ambassadors, ladies and gentlemen,

It is a great pleasure for me to open this seminar on the role of the margin of appreciation as it applies under the European Social Charter.

The seminar is held in honour of three prominent members of the European Committee of Social Rights who will leave the Committee at the end of the year after having served for the maximum two terms of office: Mr Jean-Michel Belorgey, a former President and currently the General Rapporteur of the Committee, Ms Csilla Kollonay Lehoczky and Mr Andrzej Swiatkowski, a former Vice-President.

And let me make it clear right away (on this I will allow no margin of appreciation!): these three members have served with distinction and excellence during this first decade of the millennium which has seen a virtual transformation of the Charter, not only in terms of its operation, but especially in terms of its visibility and impact.

During their tenure in the Committee the number of States Parties to the Charter grew dramatically to the 43 we have today and it is especially noteworthy that the Revised Charter, which entered into force just shortly before they joined the Committee, has now been ratified by 32 States Parties with more to come in the near future. I know that Mr Belorgey, Ms Kollonay Lehoczky and Mr Swiatkowski will not lay claim to sole responsibility for these important developments, but I have no doubt that their tireless efforts to promote the Charter in their home countries, during numerous missions to other member states as well as here in Strasbourg count for something.

Their election to the Committee coincided with the entering into operation of the collective complaints procedure and they have played a key role in nurturing this procedure into what it is today: a procedure that is becoming increasingly attractive for civil society organisations, a procedure that is rendering groundbreaking human rights decisions on a very wide range of rights and a procedure that is basically the epitome of what the CoE does best.

They have from day one fought valiantly for the principle of the indivisibility of human rights, that social rights are human rights and that they are justiciable as such. And not only are social rights human rights, they are absolutely crucial to the CoE's mission of promoting democracy and the rule of law.

To cut a long story short: their work for the Committee has been of inestimable value to the CoE, to the Charter and, in the final analysis, to the populations of Europe. I can only hope that the new members that were elected by the Committee of Ministers just last week will be able fill the void their departure creates.

Let me now briefly touch upon the topic of today's seminar. The margin of appreciation doctrine applied by the Court when interpreting certain provisions of the Convention is well known, I believe. It is perhaps less well known under the Charter, but it is no less important, if anything it is even more comprehensive, and this is why I am particularly interested in the results of the discussions this afternoon.

As we know it for the Convention, “margin of appreciation” under the Charter refers to the room for manoeuvre that States enjoy in fulfilling their obligations under this treaty.

There is no doubt that the deeply-rooted diversity of social policy systems in Europe, including not least their industrial relations component, must induce caution on any international judicial body when assessing national situations. Moreover, the common concern of European States for respecting individual rights makes it natural to allow a certain margin of appreciation.

I do not intend to go into any details with the Committee’s use of the margin of appreciation doctrine. I am confident that this afternoon’s speakers will be able to do this much better than I and so will enable us to gain a fuller understanding of how this doctrine operates under the European Social Charter.

Nevertheless, I would like to state my view that the Committee in its conclusions and decisions shows a healthy respect for national traditions and for principles such as subsidiarity duly acknowledging that national institutions are often better placed to judge than a Strasbourg body. However, the Committee never loses sight of the fact that the Charter was adopted to protect the rights of people, nor of the principle that the Charter provisions must be interpreted so as to give life and meaning to fundamental social rights in order to achieve the objectives of the treaty.

In conclusion, on behalf of the CoE, let me once again thank Mr Belorgey, Ms Kollonay Lehoczky and Mr Swiatkowski for their distinguished service. I wish them the best of luck as I do for today’s seminar which may be taken as a small token of our gratitude.

Opening Address

Jean-Paul Costa, President of the International Institute for Human Rights

Mr Chairman of the Committee of the Ministers,
Madam Deputy Secretary General of the Council of Europe,
Mr Chairman of the European Committee of Social Rights,
Ladies and Gentlemen,

I will be very brief but I would like to make four remarks:

Firstly, and once again, we, the Council of Europe and the International Institute for Human Rights, are holding a joint working meeting at the Palais de l'Europe as the Council of Europe's guests. Despite the disproportionate sizes of the two institutions, we manage to organise joint activities. I very much welcome this, as I told Mr Jagland, who, if I may say so, was on the same wavelength as myself.

Secondly, this is not the first time that our Institute has devoted its discussions to the Social Charter and the work of the European Committee of Social Rights. Our founder, René Cassin, attached great importance to the indivisibility of social rights, to the link between political freedoms and economic and social rights. When participating in the drafting of the Universal Declaration and then in the preparation of the two Covenants, he laid much emphasis on the importance of all human rights, for human beings are a whole and have many sides, not only one. We firmly believe in and faithfully follow this approach. I have had the daunting task of following three times in Cassin's footsteps and I in no way wish to betray his message.

Then on a more personal level, those who know me know that I support the principle of the growing influence of the Social Charter and, if possible, of the greater enforceability of the rights it enshrines. I have written on this subject; I have insisted that the Committee and the European Court of Human Rights meet; and during my may years' judicial practice at the Court, first as a judge and later as President, I can say, without breaching the confidentiality of judicial deliberations that I was one of those who upheld the idea, already expressed by the Court at the end of the 1970s, that there is no firewall between the two main categories of rights. You already know that in its decision the Court has very often drawn on the Social Charter and the Committee's findings. It has even been criticised for doing so, in particular by states which are not fervent defenders of national and international protection of social rights. The subject of this seminar, countries' margin of discretion, which will be examined from three different angles, is interesting because this concept, which is frequently part of the Court's case-law, helps to gauge the varying degrees of states' commitment, the modular nature of their attachment to social rights and their discipline once your Committee has issued its findings.

Finally, I would also like to underline the recent participation in the Committee's sessions of three of its eminent members. In so doing I am obliged to breach the principle of equality as I do not have the honour of personally knowing Ms Kollonay Lehoczy and Mr Swiatkowski, but their reputation suffices for me to pay tribute to their work, whereas Jean-Michel Bélorgey is a former colleague from the *Conseil d'Etat* and has been my friend for over thirty years, so I think that our friendship may now be taken for granted! In France as in Strasbourg, he has, in a variety of posts, been a tireless defender of justice, equality and human dignity. I take the liberty of publically paying him tribute as a friend.

Ladies and Gentlemen, I promised you I would be brief. You have a very busy agenda this afternoon and I do not wish to keep you from your discussions. On behalf of the International Institute of Human Rights, I am pleased to see you here today and I am sure that you will find pleasure and considerable interest in this seminar.

Thank you!

Opening address

S.E.M. Francesc Camp Torres, Minister of Tourism and Environment of Andorra

Deputy Secretary General, President, Executive Secretary, dear friends,

As the representative of the country holding the chairmanship of the Committee of Ministers of the Council of Europe, I am particularly pleased to have the opportunity to address the participants at this seminar on states' discretion in the implementation of the European Social Charter. The theme clearly ties in with member states' questions and concerns.

In addition to protecting and promoting civil and political rights, which are enshrined in the European Convention on Human Rights, ensuring social rights is another key human rights objective of the Council of Europe. It is based on the principle of indivisibility and interdependence of these rights, which is a precondition for their universality. As the guardian of social and economic rights, the European Social Charter is therefore a vital tool for preserving and promoting human rights, democracy and the rule of law in Europe.

Article 1 of the constitution adopted by Andorra on 14 March 1993 provides that it is "a democratic and social independent state", and I emphasise the term "social". Andorra joined the Council of Europe on 10 November 1994. We signed the May 1996 revised European Social Charter on 4 November 2000 and ratified it four years later, on 12 November 2004, accepting its 79 paragraphs. The country is covered by the reporting procedure and has submitted five reports since ratification. The European Committee of Social Rights has found the situation to be in conformity with the provisions of the Charter in several cases. In general, however, the situation in terms of protecting social and economic rights in Europe is difficult at present. If states are to be able to maintain their social policy levels, major efforts will have to be made in the management of national budgets. The current period is not at all conducive to growth in revenues and governments will have no choice but to prioritise expenditure which really contributes to stability and social progress.

Obviously, respect for economic and social rights is suffering particularly in these times of crisis and rising extremism and intolerance, and we therefore believed that it was vital during our chairmanship to consider where the learning of respect for human rights and democratic citizenship begins. That is why we made education the priority for the chairmanship. In particular, we proposed launching a process of reflection on education as a means of promoting democratic values, respect for human rights, tolerance and intercultural dialogue.

This is the first time that Andorra has held the chairmanship of the Committee of Ministers since it joined the Council of Europe and we wish to reaffirm our commitment towards the Council of Europe and its achievements and legal instruments. Education is a vital aspect of learning to live together in harmony in accordance with the values of the Council of Europe and it could therefore be said that it is an integral part of the European Social Charter.

To take up this theme straight away and before even receiving the findings of the various conferences on the tools which will serve as a benchmark at European level, we have organised various educational, pedagogical and cultural activities in our schools for the pupils in the country's three education systems. The aims of these activities were to raise awareness of the Council of Europe, the values it advocates and its recommendations on democratic citizenship and human rights. Ultimately, we hope to be able to identify tools to

give first teachers and then pupils a common grounding in upholding democracy and human rights.

It also seems important to mention the Committee of Ministers' declaration on the 50th anniversary of the Charter, which solemnly reaffirms the Charter's paramount role in guaranteeing and promoting social rights in Europe and calls for the broadest possible ratification of the revised European Social Charter. At the same time, the Committee of Ministers expressed its resolve to secure the effectiveness of the Charter and confirmed its resolve to support the States Parties in their efforts to bring their national situations into conformity with the provisions of the Charter. It also promotes the European Social Charter as the benchmark for social rights and intergovernmental activities in the social sector.

In addition, the Andorran chairmanship believes that additional efforts are necessary to secure human rights throughout Europe, and we are pleased in this connection to be able to take part in events which are so practical and informative as this seminar. We will study the conclusions very closely.

The theme of the seminar involves our discussing the possibility states have for weighing up the arrangements for implementing their obligations under the legal instruments which they have accepted. States' discretion is, of course, related to national authorities' awareness of the needs of their population. The question is knowing the limits of discretion, for instance so that interference by the authorities remains legitimate and individual rights are upheld in practice. That is a very broad topic which must be the focus of governments' and international institutions' attention. I am looking forward to hearing specialists' views on the matter.

Lastly, I should like to thank Mr Lluís Jimena Quesada, President of the European Committee of Social Rights, who took part in the Summer University in Andorra this year on the subject of "Europe's influence throughout the world". His impressive presentation on the protection of social rights in Europe in times of crisis confirmed our belief that it is vital to defend social rights, especially in times of crisis.

I should also like to thank Ms Kollonay Lehoczky and Mr Belorgey and Mr Swiatkowski, whose terms on the European Committee of Social Rights are ending. We thank them for their commitment, their expertise and their outstanding contribution to expanding the protection of social and economic rights throughout Europe.

It only remains for me to wish you a successful seminar.
Thank you for your attention.

The discretion of the States in choosing their commitments

Peggy Ducoulombier, Professor, University of Perpignan

The discretion of states in choosing their commitments is reflected in the "à la carte" system for accepting provisions of the European Social Charter ("the Charter"). This is the distinctive feature which has contributed to its reputation – good or bad.

The discretion granted to states can indeed be regarded as strength because, without it, the states might have been reluctant to ratify the Charter. By providing an *à la carte* acceptance system, the Charter opted for a realistic approach, taking account of the fragile history of the protection of economic and social rights and the uneven wealth of the Council of Europe's member states.

It should also be emphasised that there are limits to this discretion, as States Parties must undertake to accept a minimum number of provisions from the hard core of the Social Charter[1] *(for the revised European Social Charter (RESC), 6 out of 9 hard-core articles,[2] for the ESC, 5 out of 7).* They must then accept to be bound by further provisions adding up to a minimum total of articles or numbered paragraphs of articles *(16 Articles or 63 numbered paragraphs for the RESC[3], and 10 articles or 45 numbered paragraphs for the 1961 Charter).*

Furthermore, when states ratify, accept or approve the revised European Social Charter, a "ratchet mechanism" forces them to consider themselves bound at least by the provisions corresponding to those of the 1961 Charter and the Additional Protocol by which they were previously bound[4]. However, states may explicitly denounce certain provisions before ratifying the Revised Charter[5] to circumvent this requirement. *Lastly, the Charter does not authorise states to use it to reduce the protection afforded by domestic law or other international agreements[6].*

However, it is also possible to argue the opposite. The *à la carte* acceptance system results in varying magnitudes of protection of economic and social rights. It also runs counter to the idea of the indivisibility of human rights, making what would be unacceptable for civil and political rights acceptable. *The existence of a system of reports on non-accepted provisions[7]*

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[1] Incorrectly perhaps (?) because these rights are not protected by any derogation under exceptional circumstances: Part V, Article F, Derogations in time of war or public emergency.

[2] Right to work, right to organise, right to bargain collectively, right of children and young persons to protection, right to social security, right to social and medical assistance, right of the family to social, legal and economic protection, right of migrant workers and their families to protection and assistance and right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

[3] Part III, Article A Undertakings.

[4] Part III, Article B, Links with the European Social Charter and the 1988 Additional Protocol: if a state accepts the RESC without accepting a provision by which it was already bound, it remains bound by it. Explanatory Report on the RESC: The purpose is to ensure that when States ratify the Revised Charter they do not implicitly denounce certain provisions of the Charter. States which accepted more than the minimum number of provisions established by Article 20 of the Charter might be tempted, when ratifying the Revised Charter, not to be bound by certain provisions of the Revised Charter corresponding to provisions of the Charter which they had previously accepted. This might apply, for example, to provisions with which in the opinion of the supervisory bodies the States in question do not comply.

[5] An example was Cyprus, which denounced two provisions of the 1961 Charter before ratifying the Revised Charter. See Article M of the RESC – in the event of a denunciation, the minimum number of provisions provided for by the RESC must be retained.

[6] Part V Article H.

[7] Article 22 of the 1961 Charter, as implemented by a decision of the Committee of Ministers of 11 December 2002, deciding that in order to revive its use, states which have not accepted the RESC would submit a report on non-accepted provisions every five years.

has resulted in some progress in the level of states' undertakings[8]*, but this progress is still inferior to the level recommended by the European Committee of Social Rights*. Although the *à la* carte acceptance mechanism was intended to facilitate ratification of the Charter, the ultimate aim is still for all provisions to be accepted as soon as the situation in the country so permits. However, for many states, the use of discretion, which was supposed to be temporary, has endured.

Whether one has a positive or a negative view of this discretion, it seems on the face of it to be an incontrovertible fact. However, after looking into the way in which it is used by states, it will be necessary to investigate its limits and highlight the means by which it has been possible to counter it.

I. The *à la carte* protection of economic and social rights – a consequence of the discretion of states in choosing their commitments

The first conclusion is that states **have made full use of their discretion** because very few of the 43 states bound by the Social Charter have subscribed to all the provisions of the original or the Revised Charter. Spain has accepted all of the provisions of the 1961 Charter save Article 8§4 b), which it denounced in 1990. It has signed but not yet ratified the Revised Charter and it is not bound by the Collective Complaints Protocol. Only France and Portugal have accepted all the provisions of the Revised Charter [Italy and the Netherlands have accepted 97 paragraphs] and both have accepted the Collective Complaints Protocol.

To look into states' commitments in more detail, we should divide them into so-called western and southern European countries and eastern European countries (CEE and Baltic countries)[9]*.*

If we examine the west European states, what do we see? Firstly, there is a high level of commitment[10]: all of the states that have ratified the Revised Charter have accepted **at least 72** of its 98 numbered paragraphs, exceeding the minimum requirement of 63. More specifically, only Malta has accepted only 72 paragraphs as Cyprus recently increased its commitment, passing from the minimum of 63 paragraphs to 73 paragraphs. Most other states are located at a level of more than 80 or even 90 paragraphs. As to the states that have ratified the 1961 Charter, the lowest commitment is that of Iceland, with 14 Articles, totalling 41 numbered paragraphs. As Spain has not accepted the Collective Complaints

[8] For example, Estonia, which accepted 8 further provisions in 2012, Cyprus, and perhaps at some point soon, Andorra, whose government indicated in its latest report that several further provisions of the Charter could be accepted.

[9] Although this division may seem unsatisfactory given the lack of economic and cultural convergence between some of the states grouped together in these blocks, it can be justified by these states' shared history and has the advantage that it creates two comparable groups in quantitative terms (22 eastern states, 21 western).

[10] 14 of these states have ratified the Revised Charter: Andorra has accepted 75/9 of the 98 paragraphs; Austria, 76; Belgium, 87 + the Collective Complaints Protocol but no declaration on national NGOs; Cyprus, 72 paragraphs in 2011 following the ECSR's conclusions on its first report on non-accepted provisions + the Collective Complaints Protocol but no declaration on national NGOs; Finland, 88 paragraphs + the Collective Complaints Protocol and a declaration on national NGOs (only state to have made one); France, 98 paragraphs + the Collective Complaints Protocol but no declaration on national NGOs; Ireland, 92 paragraphs + the Collective Complaints Protocol but no declaration on national NGOs; Italy 97 paragraphs + the Collective Complaints Protocol but no declaration on national NGOs; Malta, 72 paragraphs; Netherlands, 97 paragraphs + the Collective Complaints Protocol but no declaration on national NGOs; Norway, 80 paragraphs + the Collective Complaints Protocol but no declaration on national NGOs; Portugal, every provision + the Collective Complaints Protocol but no declaration on national NGOs; Sweden, 83 paragraphs + the Collective Complaints Protocol but no declaration on national NGOs; Turkey, 91 paragraphs. Seven of these states have ratified the 1961 Charter: Denmark, 45 out of 72 paragraphs + 4 articles of the Additional Protocol; Germany, 67 paragraphs; Greece, 67 paragraphs + the Additional Protocol + the Collective Complaints Protocol but not the declaration; Iceland, 41 paragraphs; Luxembourg, 69 paragraphs; Spain – all the provisions except one sub-paragraph; United Kingdom, 60 paragraphs.

Protocol, it can be said that Greece, which has accepted the Protocol and is bound by 67 of the 72 paragraphs along with four articles of the Additional Protocol, offers the most satisfactory protection. In total, 11 western European states out of 15 have accepted the Collective Complaints Protocol.

There are common factors in states' use of their discretion reflected in the fact that some provisions are less "popular" than others[11].

It would be impossible in 20 minutes to go through all the reasons behind these choices. We should focus instead on provisions relating to certain particularly vulnerable categories of the population[12], namely Article 7 on the right of children and young persons to protection, Article 8 on the right of employed women to protection of maternity, Article 19 on the rights of migrant workers and Articles 30 and 31 on protection against poverty and exclusion and the right to housing. The total or partial non-acceptance of these provisions by an appreciable number of states, some of which are founding members of the Council of Europe, may be somewhat surprising. Among the states which have used their discretion to limit their acceptance of Articles 7, 8 and 19 are, mainly, the north European countries (Norway, Denmark, Sweden, which has, however, accepted Article 19, Iceland, Finland) and Austria, added to which, depending on the provisions concerned, are states such as Germany (for Articles 7 and 8), the Benelux countries (Belgium for one paragraph of Article 19, the Netherlands for one paragraph of Article 19 and Luxembourg for Article 8), Ireland (for Article 8), the United Kingdom (for 7 and 8) and some southern states: Andorra (for Article 19), Cyprus (for 7 and 8) and Malta (for 8 and 19).

With regard to Articles 7 and 8 (*for which 9 and 12 states respectively out of 21 made use of their discretion and limited their acceptance)*, the states' disaffection might be accounted for by different work cultures together with a formal idea of equality, resulting in a national situation which these states could fear not to be in conformity with the requirements of the European Committee of Social Rights (ECSR). Sometimes it is clear, on reading the conclusions on the reports on non-accepted provisions, that the situation in the states concerned does not meet the necessary requirements, prompting the ECSR to conclude that it is impossible for the country to accept the provision immediately[13]. **Discretion plays its prime role here, which is to enable states to adjust their international commitment to the national level of protection of economic and social rights.**

On this issue the interpretations of the state and the ECSR diverge, however. For example, Ireland considers that it cannot accept Article 8§3 even though a law of 2004 protects employed women nursing infants until the child is six months old. While the ECSR points out that such protection should be provided up to the end of the child's ninth month, it recommends that Ireland should accept the provision because each national situation is assessed on a case by case basis. It is understandable that Ireland does not want to run the

[11] The articles that are least accepted in full or in part by western European states are Articles 2 and 4, both of which were rejected by 9 states, and Articles 7 and 8, rejected respectively by 9 and 12 states despite the fact that Article 7 forms part of the hard core. Next comes Article 21, which was also rejected by 9 states, then Article 19, which is also part of the hard core and was rejected by 9 states, then Article 18, which was rejected by 5 states. Seven states have not accepted Articles 22 and 23 and 6 have not accepted Articles 31 and 27, which form part of the new rights guaranteed by the Revised Charter. Only 3 out of 14 states have not accepted Article 30. Lastly, 5 states have not accepted all or part of Article 6, which also forms part of the hard core.

[12] Autism-Europe v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003, §53.

[13] For example, Sweden cannot accept Article 8§5 on the prohibition of work underground because, in the name of the principle of equality, it generally refuses to bar one occupation or another to women and does not regard this work as dangerous. Norway does not yet feel ready to accept Article 7§4 on the working hours of young people, which could be considered too long in relation to the ECSR's requirements, even though, in its report, the delegation says that it seems that the article could be accepted but not immediately. On the other hand, it cannot accept Article 8§2 because pregnant women may receive notice during the prohibited period albeit without immediate effect.

risk of a finding of non-conformity, particularly in the light of the ECSR's conclusions in 2011 on the other aspects of Article 8, as the conclusion of the delegation from the committee does not guarantee that the national situation will subsequently be found to be in conformity with the Charter, but merely that there is no major obstacle to the acceptance of the provision[14]. **Here the use of the state's discretion stems from a cautious approach to a situation in which the state is unable to judge clearly whether it is in conformity with the Social Charter.**

Similar patterns of thinking can also be found in relation to the other non-accepted provisions. This is the case with Article 19, in respect of which 9 states made use of their discretion, applying it to varying extents and sometimes rejecting only one paragraph. It applies, for example, to the Netherlands' refusal to accept Article 19§12, which is explained by the fact that facilitating the teaching of the mother tongue of a migrant worker's child is not a priority in the light of the policy pursued by the authorities, whose aim is to foster the integration of migrants through instruction in the official state language. *However, this explanation seems less convincing when it is known that the Netherlands has ratified the Convention on the status of migrant workers, which contains the same provision (Article 15, ETS No. 93*). In other cases, the entire article has been rejected (by Denmark and Iceland, for example), and concerns over the state of the labour market and geographical proximity with less prosperous states might account for states' reluctance to be bound by a provision whose aim is to grant a series of rights to migrant workers and their families, resulting in extra burdens on public finances. However, we have little information on the reasons for this rejection. The report by Austria will be particularly interesting to read in this respect because of its geographical location, but, as it only ratified the Revised Charter in 2011, it has not yet been submitted[15].

Lastly, some of the new rights enshrined in the Revised Charter have met with a relatively positive response, particularly Article 30 on the fight against poverty and social exclusion (in respect of which only 3 out of 14 states used their discretion). On the other hand, 6 out of 14 states have not accepted all or part of Article 31 on the right to housing[16]. These rejections appear to be motivated by fears that these provisions will entail excessively high financial obligations for states or by the fact that it cannot be guaranteed that the national situation will be found to be in conformity with the Charter although they actually appear to be satisfactory. For instance, Cyprus has set up action plans and a series of measures to combat poverty and exclusion but despite the ECSR's encouragements, it has still not accepted Article 30. Ireland's justification for refusing to accept Article 31 is that it is worried that this provision will require the establishment of an "enforceable right to housing", even though the article imposes only obligations of conduct and not of results[17]. *Other situations are more encouraging because the state's non-acceptance is the result not of insufficient protection but of considerations linked to the institutional structure of the state. For instance, Article 31 has not been accepted by Belgium because its scope of application is a matter for the Belgian regions, which have taken measures guaranteeing protection of the right to*

[14] We can only speculate about the reasons for the non-acceptance of this provision as Ireland has not submitted its 2nd report on non-accepted provisions.

[15] We have very little information because a large number of states which have not accepted all or part of Article 19 have not submitted reports, either because they are not covered by the Revised Charter or because they ratified it too recently.

[16] Account should also be taken of the fact that these articles do not bind the states still covered by the 1961 Charter, which are mostly western states (Article 30: not accepted by Austria, Cyprus, Malta + states under 1961 Charter: Germany, Russian Federation, Denmark, Greece, Iceland, Luxembourg and Spain, and for Article 31, the numbers are even greater: 1961 Charter states + Andorra, Austria, Belgium, Cyprus, Ireland and Malta).

[17] By contrast, see the law on the enforceable right to housing in France and the decision of the Paris Administrative Court of Appeal of 20 September 2012.

housing. Belgium could accept the provision if an agreement were reached by the regions with competence in this area[18].

With regard to the east European countries[19], the level of acceptance is satisfactory although there are notable exceptions such as Latvia, which has the lowest level of commitment, having accepted only 25 of the 72 paragraphs of the 1961 Charter[20] and, as far as the Revised Charter is concerned, Azerbaijan, which has accepted only 47 of the 98 paragraphs. The average level of acceptance for the Revised Charter lies between 60 and 70 paragraphs. However, some states are exceptions and show a high level of commitment, such as Serbia, which has accepted 88 of the 98 paragraphs, Slovakia, which has accepted 86, Slovenia, with 95 and, since June 2012, Estonia, which has accepted 8 further provisions bringing the number of paragraphs it has accepted up to 87 out of 98. These positive developments should be qualified, however, by the fact that only 4 east European states have accepted the collective complaints procedure, namely Croatia, the Czech Republic, Bulgaria and Slovenia.

The level of commitment of east European states is therefore generally lower than that of the west European states, but these states, which joined the Council of Europe only recently, have had to cope with a complex economic transition, which may explain and justify their reticence.

In contrast with the west European states, the way in which the east European states exercise their discretion reveals that it is not so much Articles 7 and 8 which pose them problems (or the trade union rights in Articles 5 and 6[21]) but Articles 12 (right to social security) and 13 (right to social and medical assistance)[22], most probably because of the high costs entailed by guaranteeing these rights[23], despite the fact that these two articles form part of the hard core of the Social Charter.

There is also a low rate of acceptance of Articles 18 and 19[24] (much lower than in the West), which may be accounted for by the sometimes difficult relationships between some of these states and their neighbours, together with fears related to the impact on the labour market similar to those in the West. Lastly, there is considerably greater reluctance to accept

[18] It should be pointed out that the interpretation of Articles 16 and 30 of the Charter, which have been accepted by Belgium, gives rise to the incorporation of the ECSR's conclusions on Article 31 into the assessment of collective complaints under Articles 16 and 30 relating to the right to housing.

[19] Revised Charter: Albania: 64 out of 98 paragraphs; Armenia, 67 paragraphs; Azerbaijan, 47 paragraphs; Bosnia and Herzegovina, 51 paragraphs; Bulgaria, 62 paragraphs + Collective Complaints Protocol but no declaration yet authorising national NGOs to lodge complaints; Estonia, 87 paragraphs since June 2012; Georgia, 63 paragraphs; Hungary, 60 paragraphs; Lithuania, 86 paragraphs; Moldova, 63 paragraphs; Montenegro, 66 paragraphs; Romania, 65 paragraphs; Russia, 67 paragraphs; Serbia 88 paragraphs; Slovenia, 95 paragraphs + Collective Complaints Protocol but no declaration yet authorising national NGOs to lodge complaints; Slovakia, 86 paragraphs; FYROM, 63 paragraphs; Ukraine, 74 paragraphs. 1961 Charter: Croatia has ratified 40 of the 72 paragraphs + 3 of the 4 articles of the Additional Protocol + Collective Complaints Protocol but no declaration on national NGOs; Czech Republic, 51 paragraphs (denounced Article 8§4 in 2008) + 4 Articles of the Additional Protocol + recently gave authorisation to be bound by the Collective Complaints Protocol; Latvia, 25 paragraphs; Poland, 57 (denounced Article 8§4 in 2011).

[20] Exceeding nonetheless the minimum amount of 10 paragraphs.

[21] Only Poland has not accepted Article 6§4.

[22] 12 eastern states have not accepted Article 12 as opposed to 3 western ones, whereas 15 have not accepted Article 13 as opposed to only one in the West.

[23] In western Europe, only the United Kingdom has refused to accept three of the paragraphs of Article 12, whereas in eastern Europe, only Montenegro, Serbia, the former Yugoslav Republic of Macedonia and the Czech Republic have accepted all of these provisions. Considerable use has also been made of states' discretion with regard to Articles 2 and 4 as in the West, albeit to a lesser extent.

[24] 18 states in the East have not accepted Article 18, compared to 5 in the West, while 16 states in the East have not accepted Article 19 compared to 8 in the West.

Articles 30 and 31 than in the West[25] (for example, Slovenia is the only eastern state to have accepted Article 31 in full), and it is also reasonable to think that the financial burden that guaranteeing these rights places on governments and the perception that the obligations enshrined in these articles are somewhat imprecise explains the eastern European states' timid approach[26]. Such explanations are to be found for instance in the report on non-accepted provisions by Bulgaria – a state which, despite a high overall level of commitment, has not accepted, in particular, all or part of Articles 12, 13, 18, 19, 30 and 31 – and in which the state relies on the economic crisis and the labour market situation to justify its refusal to accept certain provisions[27].

States have therefore made use of their discretion as they were entitled to and, for some of them, very wisely in view of their national situation. However, this discretion has also been used excessively by some states because they have forgotten the progressive nature of their commitment to be bound ultimately by all the provisions of the Social Charter. It is not surprising therefore to see that the ECSR and the European Court of Human Rights have been using all the interpretative means at their disposal to limit the adverse effects of this discretion in relation to the ultimate aim pursued by the Social Charter, which is to protect the indivisible rights of human beings.

II. A dynamic interpretative approach as a means of restricting states' discretion when choosing their commitments

The use by states of their discretion to limit their commitments has given rise to a variation in the protection of economic and social rights, whose effects have become even more palpable since the emergence of the collective complaints procedure. Collective complaints on non-accepted provisions are inadmissible[28]. Not only is this variable protection unsatisfactory in principle but it can encounter conceptual problems linked to the **interdependence** of economic and social rights. The *à la carte* acceptance procedure which makes it possible to single out individual paragraphs within the articles of the Social Charter fails to take account of the fact that some provisions, while not offering identical protection, do overlap nonetheless[29]. In such cases, it may be that states' discretion is not enough to prevent the process whereby the rights concerned take the upper hand as a result of the ECSR's interpretation of the Charter. **In this context the ECSR takes advantage of the complementary nature of the Charter provisions and makes a holistic interpretation in order to counter the effects of the use by states of their discretion** and to circumvent the fact that the impugned state has not accepted certain provisions[30]. This is what the

[25] 13 states in the East have not accepted Article 30 compared to 3 in the West, while 17 states in the East have accepted Article 31 compared to 6 in the West. These figures do not include states which are bound only by the 1961 Charter. It is also worth noting the low rate of acceptance of Article 23, which 15 states have not accepted, linked to the low rate of acceptance of Articles 12, 13, 30 and 31, and of Article 15 (14 states have not accepted it compared to 1 in the West). In addition, a large proportion of states have not accepted Articles 2, 4 or 10.

[26] Nor are the ECSR's conclusions (Conclusions XIX-2 of 2009) that "the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter" and hence that "governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most" liable to encourage states to accept new provisions, or at least not in the current context.

[27] For example, with regard to Article 12§4 on the equal treatment of nationals of other parties in the social security field. Bulgaria is the EU state which issues the fewest work permits.

[28] Article 4 of the 1995 Protocol: The complaint shall be lodged in writing, relate to a provision of the Charter accepted by the Contracting Party concerned and indicate in what respect the latter has not ensured the satisfactory application of this provision. Complaints must also be lodged by an authorised organisation but I will not be covering this point.

[29] For example, Article 1§4 (right to work) is linked to Articles 9 and 10 (vocational guidance and training), Article 9 may be linked to Article 15 where it comes to the integration of people with disabilities, Article 16 may be linked to Article 31, and so on.

[30] See, for example, ERRC v. Bulgaria, decision on the merits of 18 October 2006, in which the ECSR allows the complaint on the right to education of children with disabilities under Article 17 rather than Article 15, which Bulgaria has not accepted.

ECSR points out in its decision on the merits of 21 March 2012, FIDH v. Belgium[31], when it states that "the Charter was conceived as a whole and all its provisions complement each other and overlap in part. It is impossible to draw watertight divisions between the material scope of each article or paragraph. … This is the case with the right to housing". Consequently, protection of the rights enshrined in Article 31, which, as has been seen, is not generally accepted by the States parties, can be sought through other provisions. This is often done through Article 16 (for families)[32], but other articles may be brought into play such as Articles 15 (for people with disabilities), 17 (for children[33]), 19 (for migrant workers[34]), 23 (for elderly people), 30 (on the fight against poverty and exclusion[35]). Admittedly, this approach may somewhat undermine legal certainty but this kind of interpretation does result in increased protection for human rights and is justified by international rules on the interpretation of treaties[36].

However, it is not the ECSR's intention to do away entirely with the states' discretion, as it points out in the complaint cited above: "It … falls to the Committee to ensure at the same time that obligations are not imposed on States stemming from provisions they did not intend to accept and that the essential core of accepted provisions is not amputated as a result of the fact it may contain obligations which may also result from unaccepted provisions". Accordingly, it refused recently to consider that Article 3§1a of the 1988 Protocol (on the right to take part in the determination and improvement of working conditions and the working environment) applied in the case of General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, decision on the merits of 23 May 2012, which would have enabled it to circumvent the non-acceptance by Greece of the right to bargain collectively provided for in Article 6. The Committee found, albeit it not unanimously, that Article 3§1a of the Additional Protocol did not relate to the right to bargain collectively and that the question raised by the complainants fell within the scope of Articles 5 and 6 of the 1961 Charter [and therefore it could not examine it as Greece had not accepted these provisions].

In addition, the ECSR adopts a **teleological approach** to its interpretation[37] to limit the effects of the Charter's personal scope, reducing the states' discretion by extending the scope of the Charter beyond what was initially planned and accepted by the states. It is true that, somewhat surprisingly for a human rights treaty[38], the Charter does not apply to nationals from third parties or to nationals of States parties unlawfully present in the country[39]. This exclusion may lead to problems with the application of the Charter to persons who are actually covered by it or simply give rise to situations which are unacceptable in

[31] Complaint No. 62/2010, decision on admissibility of 1 December 2010.
[32] ERRC v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §17, and ERRC v. France, Complaint No. 51/2008, decision on the merits of 19 October 2009, §89, decision on the merits of 11 December 2009, INTERRIGHTS v. Greece, 25 June 2010 COHRE v. Italy: "like many other provisions of the Charter, Articles 16 and 31, though different in personal and material scope, partially overlap with respect to several aspects of the right to housing. In this respect, the notions of adequate housing and forced eviction are identical under Articles 16 and 31".
[33] DCI v. the Netherlands, 20 October 2009.
[34] Decision on the merits of 25 June 2010, Centre on Housing Rights and Evictions (COHRE) v. Italy, Complaint No; 58/2009: the complainant refers to Articles 16, 19, 30, 31 and E. §144 refers to Article 19§4: the ECSR considers that the finding of a violation of Article E taken in conjunction with Article 31 amounts to a finding of a violation of Article E taken in conjunction with Article 19§4 with regard to Roma and Sinti migrants and their families residing legally in Italy.
[35] FIDH v. Belgium, decision on the merits, 21 March 2012.
[36] Article 31§1 of the Vienna Convention: "a treaty shall be interpreted in good faith 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".
[37] DCI v. the Netherlands, 20 October 2009, §36. See also OMCT v. Ireland, 7 December 2004, §60.
[38] The express aim of Articles 12§4 and 13§4 is to extend the rights guaranteed by these articles to the legal nationals of other states, and the provisions of the Charter must also be read in the light of Articles 18 and 19.
[39] DCI v. the Netherlands, 20 October 2009.

view of the Charter's aims and purpose. Particularly since its decision on the merits in FIDH v. France of 8 September 2004, the ECSR has adopted an audaciously strict interpretation[40] of the restrictions on the application of the Social Charter[41], while repeatedly calling for their abrogation[42]. Firstly, as regards the protection of persons covered by the Charter's personal scope, in several cases involving Roma[43], the ECSR has not allowed the defendant state to argue that within this category, some people were nationals of third parties or unlawfully present nationals of States parties to evade its obligations. The ECSR stated for instance that although "it is extremely complex to distinguish to whom the protection guaranteed by the Charter and its Appendix applies without restrictions … the lack of identification possibilities should not lead to depriving persons fully protected by the Charter of their rights under it".

The ECSR not only reiterates the duty to protect the rights of those covered by the Charter but goes beyond this, pointing out that "those of the population concerned who do not meet the definition in the Appendix cannot be deprived of their rights linked to life and dignity under the Charter". These rights are not expressly mentioned by the Charter but arise from some of its provisions[44] and, as with the principle of dignity enshrined in the law of the European Convention on Human Rights (ECHR), to which it serves as a counterpart[45], they also underpin it (FIDH v. France[46]). Consequently, the states' commitment must be reviewed in the light of this statement, which extends the benefit of the Charter to new categories of people in the name of protecting the inherent dignity of all human beings. [*In this light the ECSR continues to flesh out the case-law in favour of illegally present foreign minors in FIDH v. France[47], which it took up again in the case of Defence for Children International v. the Netherlands of 20 October 2009, specifying that the restrictive clause should not be applied if it was likely to have "unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake"[48].*]

[40] In a minority view, moreover, this was not an interpretation of the Charter but well and truly an attempt to impose new obligations on the states, thus denying them their discretion in choosing their commitments.

[41] §29: Thus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, 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. The idea that the Charter is an instrument for the protection of human rights, upholding tangible and effective rights can be found in the decision on the first collective complaint, ICJ v. Portugal.

[42] See the general conclusions for 2011. On p. 11, the ECSR invites the states to make use of the opportunity they are afforded to extend the scope of the Charter.

[43] ERRC v. Italy (Complaint No. 27/2004, decision of 7 December 2005), COHRE v. Italy (25 June 2010, §§32 and 33 and 28 June 2011), COHRE v. France, 28 June 2010.

[44] For example, in its decision on FIDH v. France, the Committee holds that the right to health is a prerequisite for the preservation of human dignity.

[45] FIDH v. France, 2004, §27

[46] §27: The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity.

[47] In which it stated that, in the name of human dignity, for the preservation of which health care was a fundamental prerequisite, legislation or practice which denied entitlement to medical assistance to foreign nationals within the territory of a State Party, even if they were there illegally, was incompatible with the Charter (§§31 and 32). This was not a unanimous decision. In the dissenting opinions we find the same arguments as those expounded by Fitzmaurice in the Golder case of 1975, namely that it is for the states to amend the text of Article 17 and the Appendix if they are not satisfied with the fact that it does not apply to persons not lawfully resident in a country and that, in the guise of an interpretation or construction, the Committee is actually imposing new obligations.

[48] §37. In this case, the Committee extended its position with regard to access to health care to certain aspects of Article 31. The Government had clearly stated that when ratifying the RESC and the Protocol it had thought that its legislation on foreign nationals and even foreign children unlawfully resident in the country did not fall within the scope of the RESC. The Committee also interpreted the Charter on the basis of Article 31§1c of the Vienna Convention, in the light of any relevant rules of international law applicable in the relations between the parties. It pointed to the need to adopt a teleological approach. It found that unlawfully present children did not come within the scope of Article 31§1 but were covered by Article 31§2: "the right to shelter is closely connected to the right to life and is crucial for the respect of every person's human dignity. The Committee observes that if all children are vulnerable, growing up in the streets leaves a child in a situation of outright helplessness. It therefore considers

Does the accession of states to other international treaties make it possible to limit the negative effects of their discretion regarding their commitments in the context of the Social Charter? Although it is not necessarily good for the credibility of the Charter for the protection of social rights to be carried out through other mechanisms, as long as the Social Charter system cannot reach a higher level of protection, such indirect protection must be welcomed.

Firstly, with regard to EU membership (*despite the fact that the European Social Charter is mentioned in the EU treaties, that the Charter of Fundamental Rights contains economic and social rights whose main inspiration is the European Social Charter, that the Charter of Fundamental Rights must not be interpreted in such a manner as to reduce the scope of the rights guaranteed by other international agreements[49], and that EU law was also a source of inspiration for the revised European Social Charter)*, relations between the two systems are difficult. [*The CJEU does not mention the Social Charter or the case-law of the ECSR and there are no plans for the EU to accede to the Social Charter.*] Admittedly, in some areas, particularly equal treatment in employment and remuneration or the mobility of workers and social security, EU law compels member states to respect these economic and social rights, thereby limiting the effects of any failure to accept a similar provision of the Social Charter. However, in many other areas, the level of protection of social rights provided by the EU legal system is lower than that afforded by the Social Charter[50] and European integration cannot act as a substitute for acceptance of the provisions of the Charter. The reasons for this are, firstly, that there are more States Parties to the Charter than EU member states[51] and, secondly, that the ECSR refuses to make the presumption that the EU legal system provides equivalent protection as it currently functions[52]. Accordingly only a specific assessment by the ECSR of the national situation can enable it to conclude that it is in conformity with the Social Charter [*The ECSR took the opportunity to reiterate that the participation of certain States Parties in the EU did not mean that they could avoid their obligations under the Social Charter when examining the collective complaint against the legislative amendments adopted by Sweden following the Laval and Partneri cases, which the complainants alleged to be incompatible with Articles 5 and 6 of the Charter[53].*]

What can be said about the impact of the ECHR on states' discretion concerning their commitments? The main purpose of the ECHR is to safeguard civil and political rights and the European Court of Human Rights dismisses applications based on the Social Charter if they are not sufficiently linked with any of the provisions of the Convention[54]. However, the Court has also recognised since its judgment in *Airey v. Ireland* that there is no watertight

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that children would adversely be affected by a denial of the right to shelter". The Committee also held that children, whatever their situation, came within the personal scope of Article 17.

[49] For all that, in the context of consistent interpretation, the ECHR is the only international text which is explicitly mentioned by the Charter of Fundamental Rights.

[50] See, for example, the general outcry by the national parliaments in response to the Commission's proposal for a Monti II regulation, arguing that this proposal, which was in breach of the principle of subsidiarity, was likely to undermine the right to strike.

[51] This is why Bulgaria cannot yet accept Article 12§4.

[52] See the very clear reiteration of these principles in CGT v. France, Complaint No. 55/2009, decision on the merits of 23 June 2010: "The Committee considers that neither the situation of social rights in the European Union legal order nor the process of elaboration of secondary legislation would justify a similar presumption - even rebuttable - of conformity of legal texts of the European Union with the European Social Charter". It is not certain that the Treaty of Lisbon has changed anything in this respect even though the Committee says it is willing to review its assessment in the light of changes in the functioning of the EU in this field.

[53] Complaint No. 85/2012 - Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden.

[54] This has occurred where the applicant has referred to provisions of the Social Charter which the Court feels it does not have the authority to rule on or where the link between the articles of the Charter and certain articles of the Convention such as Articles 3 and 8 is too tenuous - Salvetti v. Italy, December 2002, C.R. v. France, 2000, Zehnalova and Zehnal v. the Czech Republic, 2002, Botta v. Italy, 1998.

separation between Convention rights and economic and social rights *[which have primarily been protected through a redefinition of Articles 6, 8, 11 and 1P1 and through the prohibition of discrimination (Article 14 + Protocol No.12, ratified by 18 states)].* As a result, the Court's dynamic interpretation of the ECHR can fill the gaps in the states' commitment at the level of the Social Charter. For example, on several occasions the Court has ignored the arguments of states which claimed that the right relied on by an applicant was covered by the Charter, not the Convention, and that since the Court was not the supervisory body of the Social Charter, it should dismiss the application. This was the argument put forward by the Russian government in the *Konstantin Markin* case of 2012 concerning the differing treatment of military personnel on the ground of their gender when granting parental leave. The Government submitted that Article 27 of the Revised Charter, by which it was bound, should not be upheld by the Court, as the right to parental leave did not fall within the scope of Article 8 of the Convention, but the Court dismissed this argument. However, it is above all the *Demir and Baykara v. Turkey* judgment of 2008 which shows the potential of the ECHR to reduce the states' discretion under the Social Charter. In this judgment the Court took account of an "emerging international consensus" and incorporated the right to collective bargaining into Article 11[55]. It did not take account of the fact that Turkey had intentionally remained on the sidelines of this "continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe" by refusing to accept Articles 5 and 6 of the Social Charter[56]. Some authors[57] have criticised the Court's interpretative dynamism because they find it unjustified or dangerous. However, the arguments they put forward are not all very convincing[58]. The discretion exercised by the states in the context of the Social Charter should not be allowed to limit the dynamic interpretation of the ECHR by the Court. The advantage of the Demir and Baykara judgment is that it pointed out that this discretion has no direct impact on the interpretation of the Convention. There is therefore no point in attempting to use the Demir and Baykara judgment for the purposes of scaremongering because states have no interest in not ratifying the Social Charter or refusing to increase their commitments as the fact that they are bound by the provisions of the Social Charter has no bearing on the interpretation of the Convention. Nonetheless, it can be conceded that in general a broad interpretation does not make relations between the human rights protection bodies and the states any easier and that ultimately, it might have a negative impact on the desire of states to get involved in the preparation and ratification of international texts and hence have a knock-on effect on the emergence of an international consensus in one area or another. It is questionable whether the fear of a lack of commitment at international level should prevent proper interpreters of international treaties to make the interpretation required in view of legal developments. Although the broad interpretation of the Convention may undermine the effectiveness of the *à la carte* acceptance system applied in the context of the Social Charter, it does also highlight the principle of the progressive nature of economic and social rights protection[59]. Lastly, the effect that this interpretation has on states' discretion should not be exaggerated given that the Court's position in the Demir and Baykara judgment is more of an exception than a rule. The Court has not yet reached the point at which it could be considered a "European Court of Social Rights"[60]. Its stance on positive obligations with regard to people with disabilities is timid, as is its approach to positive discrimination.

Although states' discretion concerning their commitments can be limited by the use of certain methods of interpretation, this does not make it any less of a feature of the Social Charter –

[55] See also *Enerji yapi yol sen v. Turkey* for the incorporation into Article 11 of the right to strike.
[56] §§ 65 to 86, § 78, in which it stresses that in searching for common ground, it has never made any distinction between texts by which states have accepted to be bound and others.
[57] JF Renucci.
[58] They say that economic and social rights are not "true" human rights, that states are going to be wary about their international commitments from now on and that soft law is no longer soft.
[59] Moreover, what is regarded as soft law is the law all the same and represents a genuine commitment.
[60] Marguénaud and Mouly, cf N. v. the United Kingdom.

a feature which, it can be hoped, will gradually be eliminated, even though not enough action is taken yet in response to the reports on non-accepted provisions. At a time of major economic and social crisis in Europe, it is unlikely that the states will relinquish their discretion despite the fact, as the ECSR points out, that "governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries most need the protection"[61].

[61] In its decision on a recent complaint against Greece, the Committee considered that measures taken to encourage greater employment flexibility with a view to combating unemployment should not deprive broad categories of employees of their fundamental rights in the field of labour law, which protected them against arbitrary decisions by their employers or the worst effects of economic fluctuations.

The discretion of the States in the implementation of the rights

Ineta Ziemele, Judge, European Court of Human Rights *

I am very grateful to the organisers of the seminar for the fact that they have also given certain discretion to the speakers and that the topic on which I was asked to intervene is rather broadly formulated.

My own reflection on discretion of States in connection with today's seminar is very useful, not least because, as Jean Paul Costa could confirm, in the European Court of Human Rights we have been, for a number of years now, in the middle of a debate with the State parties on the question of their discretion in implementing the Convention.

Even though I will comment on the European Social Charter and the discretion of states in implementing social rights, I will do so in a comparative fashion. I have chosen to compare the European Convention on Human Rights and the European Social Charter because, in this way, I think the differences come out more visibly.

However, before I go into this comparison, let me share with you a few general comments. The concept of discretionary powers is one of the key concepts in public law in general. International public law in which the European Social Charter and the Convention on Human Rights situate themselves is not an exception. In international law there are explicit and implicit possibilities for States to exercise their discretionary powers and they, of course, do so for many purposes. One very interesting example in international law would be the execution of judgments of the International Court of Justice (ICJ) as, also in the Council of Europe context, the questions of the execution of judgments of the Court as well as the implementation of the European Social Charter's Committee's findings are very important.
In the United Nations Charter there is a provision which says that where one party to a case fails to perform the obligations under a judgment rendered by the International Court of Justice, the other party may have recourse to the Security Council which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[62] Execution of the ICJ judgments is discretionary at two levels. Not only a State can determine whether it is in its interest to have recourse to the Security Council, there is also a discretionary power on the part of a particular organ of the international organisation. It has been noted that: "After almost fifty years of functioning of the UN, the instances in which action by the Security Council has been invoked under Article 94(2) are still rare: this Article was used by the UK, in 1951, with respect to the *Anglo-Iranian Oil Company* case; by Nicaragua, in 1986, in the case against the United States and by Bosnia-Herzegovina, in 1993, in the case against the Federal Republic of Yugoslavia."[63]

What about discretion of the States as concerns obligations in the field of human rights? In relation to this question and by way of a next general comment, I would like to underline the existence of a certain circularity linked to the way the international 'legislative' process works which, in fact, explains the difficulties that were just described concerning the ratification "à la carte" of the European Social Charter. In other words, the fact that these are States which draft international treaties and other documents, i.e. their own international obligations, subject this process to a considerable uncertainty and a lot of compromise. Evidently whenever States want, they will take upon themselves or allow themselves to have

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[62] See UN Charter, Art. 94.
[63] See A. Tanzi, "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations" *European Journal of International Law*, 1995, vol. 6, pp. 539 – 572, at p. 540.

discretion whether to ratify parts of the treaty or to have the provision drafted leaving States with wide discretionary powers as to the scope and consequences. We see this in both treaties, the European Social Charter and the European Convention on Human Rights. It is part of international reality that discretionary powers of States are strongly present therein in view of the fact that they are legislators. The character does change when negotiations are placed within a multilateral forum and in the context of a certain culture of human rights. Diplomatic and prestige-related considerations will then affect the text of obligations that the States will adopt for themselves but the difficulty that many have with international law as not having an objective constitutional basic norm seems to continue posing some problems, especially when dealing with the drafting of human rights treaties.

Now what happens when we deal with States' powers in implementing the European Convention on Human Rights as compared to the European Social Charter? It was already mentioned by other speakers that as far as the European Convention on Human Rights is concerned, the discretion of States is in fact embodied in the doctrine of the margin of appreciation, which is applied across the Convention, but most prominently developed when it comes to the case law of articles 8-11. It is interesting to note in relation to these provisions that the drafters, being the States, had set the boundaries for the exercise of their discretion in the implementation of articles 8 to 11; and those borders are reflected in the second parts of these articles and also in the protocols to the Convention whenever they are limiting interferences with these rights with the requirement to assess the necessity in a democratic society. Furthermore, since we have had recently to apply this article, which has not been the case before, please note also the text of the Convention's article 18 which in facts prohibits, what I would call, any 'hidden agenda' on the part of the States when they allege that they have the discretion as to how they implement the Convention's rights; and we have had to resort to Article 18 in a couple of recent cases with respect to the Russian Federation and Ukraine. In the Convention there is a double regulation of discretionary powers. First of all, a treaty delimitation of the width of margin of appreciation accorded to the States. Secondly, it will always be the Court who will supervise the exercise of the State discretionary powers permitted under the Convention. I would say, all in all, the Convention system comes very close to all the guarantees that exist in domestic legal systems, with the constitutions and the relevant mechanisms, against abuse of discretionary powers by any public authority. The convention system comes as close as one could to a proper constitutional system of protection of rights in an international law context.

As far as the European Convention is concerned, I should point out a few more features which are relevant for the discussion on the discretion of the States in the implementation of human rights. In this context I cannot avoid the concept of the European consensus, which has entered the Court's case law a long time ago and has, in the meantime, acquired many facets. One of the usages of the concept appears when the Court wants to establish whether or not a particular right in the Convention might contain a new element. In a search of the new scope of the right, the Court might look for a European consensus on a particular matter. Here again, the earlier comment on the discretionary nature of international legislative processes is relevant. States have a lot of freedom to develop their own solutions to various issues. The Court, in principle, will take note of these practices, but when they reach a certain level of universality at the regional level then the Court will profit from it and will consider that this practice has achieved a certain sort of maturity to be read into the scope of the Convention. One can talk about regional custom or one may continue referring to a broader concept of the European consensus, but this remains a very interesting phenomenon where the practice in Europe, among the European States, also comes to actually limit further the original notion of the States, including the scope of their discretionary powers. Of course I will not go into detail, but the Convention has a number of rights where no discretion is allowed or where over time, such as the right to life, any discretion that there was at the beginning, like, for example, in relation to a death sentence,

has been abolished through two processes: the emergence of the European consensus and the development of the case law of the European Court of Human Rights.

By contrast, the European Social Charter has been, in my understanding, for the most part drafted with the view to respect of State discretion in deciding upon their social models. I regret to note that the 1996 Revised Charter already in part I gives space to a lot of discretion where it qualifies that the implementation of social rights is a matter of policy aims and where it allows the States to identify all appropriate means to attain the conditions in which rights can be effectively realised. I would say that the next step for the legislative process when it comes to protection of social rights in Europe would be to do away with the introductory part to part I while maintaining the list of the rights themselves. Now, however, when it comes to part II, again by comparison with the way the Convention is drafted, we see that part II, of course, is a mixed affair. There are elements which allow the States to see the most appropriate ways of implementing their obligations in view of their national cultural historical context. There are other rights notably as concerns the right to work, where indeed one could say that the right or the elements of the right do not allow for too much of a margin of manoeuvre. I would say that article 16 speaking about family benefits is an example of the type of formulation where the States really allow themselves a lot of space for their own choices as concerns the decisions on the ways in which they will protect family life in their respective domestic situations. Already the ratification mechanism, as such, adds to the level of discretion when it comes to the implementation of social rights. I would say, all in all, the drafting used for the purposes of the European Social Charter as such is problematic. In a framework which gives so many openings for State discretion, it has to be very difficult to work for the Committee of Social Rights and we should really praise their work and their achievements.

Finally, the point has to be raised that the European Court of Human Rights comes to support the European Social Charter at two levels. Here I would like to address those cases of the European Court of Human Rights where social rights have come into the case law of the European Court, notably the right of property which has been extended to cover social benefits, pension rights, also article 11. The *Demir and Baykara* case was already mentioned which shows that we have by now an interesting jurisprudence on trade unions.[64] Articles 9 and 10 have generated the case law relevant to the protection of social rights in Europe. I would like to stop a little and give some details on the *Demir and Baykara* case, which I think highlights a number of fundamental elements. The judgement was adopted by the Grand Chamber on 12 November 2008 and it concerned the situation in Turkey where civil servants at the municipality level did not have legislation allowing them to form trade unions and to engage in the collective bargaining process. Turkey, in view of the way States can ratify the European Social Charter, had not ratified articles 5 and 6 of the Charter. The question in front of the European Court of Human Rights was whether or not article 11 on the right and freedom of assembly and the right to form trade unions, in fact extends rights and requires that there is a right to form trade unions for municipal civil servants. One of the points that the respondent State raised was that the Court has no competence to look at the issue because Turkey has not ratified articles 5 and 6 of the European Social Charter. Then Turkey raised another objection saying article 11 does not regulate these issues and has never been meant to regulate these issues. The Court looked at everything; it looked at the International Labour Organisation's conventions that Turkey had ratified and it also, of course, looked at the European Social Charter's articles 5 and 6 as well as looking at the European consensus when it comes to the situation of civil servants and their right to have trade unions. This is in a way typically how the European Court functions, whether the

[64] See CASE OF DEMİR AND BAYKARA v. TURKEY (Application no. 34503/97) [GC], judgment of 12 November 2008.

question at issue has a social element to it or a civil element to it. And this is what the Court said: firstly, the right for civil servants to be able in principle to bargain collectively was recognised by international law instruments, both universal and regional. Moreover, an examination of European practice shows that this right was recognised in the majority of member States. Secondly, Turkey had ratified the 1952 ILO Convention. There is no evidence in the case file to show that the applicants' union represented public servants engaged in the administration of the State, that is to say, according to the interpretation of the ILO's committee of experts, officials whose activities are specific to the administration of the State and who qualified for the exception provided for in the ILO Convention. And therefore the Grand Chamber endorsed the chamber's finding of a violation of Article11 primarily in view of the omission to regulate the question at a domestic level. Furthermore, the Grand Chamber said that it observed that the government failed to adduce evidence of any specific circumstances that could have justified the exclusion of the applicants as municipal civil servants, from the right inherent in their trade union freedom to bargain collectively in order to enter into the agreement in question.

The Court does not say, and this is interesting, that there wouldn't be a discretionary power on the State to assess different civil servant categories and the Court definitely goes along the lines adopted by the ILO and would have gone along the lines adopted by the European Social Charter's supervisory body. There is no question about that. The Court would not go ahead extending social rights where it wouldn't have backing from the expert authorities on the issue. But the Court probably was helpful when it comes to the implementation by Turkey of the European Social Charter in a way that would have been different under the mechanisms available to the Charter itself.

Now a few concluding remarks. The first is that the more regulation States accept and the more mechanisms of control the States themselves are to install, the more likely it is going to affect their discretionary powers. There is a danger in this and that is something that, I think, we should really think about. The States might become rather careful in engaging in international obligations with control mechanisms having had the experience of strong monitoring and control bodies including the Court. I think part of the dialogue that the Court has had with the States falls within this tension. We obviously should not avoid an on-going international legislative process and there is a natural interest of States in this process. On the other hand, we cannot avoid States claiming their discretionary powers in the implementation of their obligations either in front of the European Court of Human Rights or in front of the Committee of the European Social Charter, especially where the instrument allows for such wider claims. This is an on-going tension which is built into international legislative and implementation processes and this is probably the way forward for the better protection of rights.

Concluding remarks

Luis Jimena Quesada, President of the European Committee of Social Rights

Madam Deputy Secretary General of the Council of Europe, President Costa, Dear Jean-Paul, Mr Chairman of the Committee of Ministers of the Council of Europe, which is currently being chaired by Andorra, Ambassadors, Ladies and Gentlemen, Dear Friends and Colleagues,

I am very honoured to take the floor at the end of this important seminar. My final remarks, which will, of necessity, be brief, are in particular words of thanks.

Firstly, I welcome the strengthening of the co-operation between the International Institute of Human Rights and the Council of Europe by means of this seminar on the European Social Charter and States' margin of discretion.

René Cassin, the founder of the Institute (by which I lay great store), would be very happy to see us all sitting round the same table and to see that we are working together to ensure that the indivisibility of human rights becomes a reality. He made a major contribution himself by helping to draft the Universal Declaration of Human Rights, from the Council of Europe's two flagship treaties - the European Human Rights Convention and the European Social Charter - derive.

We have endeavoured, with this seminar, to also demonstrate the indivisibility of our joint efforts and our shared responsibilities in ensuring the indivisibility of human rights and the indivisibility of the relevant safeguards. It is with this in mind that I would like, on behalf of the Committee and the Social Charter Department, to express our gratitude to Madam the Deputy Secretary General of the Council of Europe, to the International Institute of Human Rights (which is represented here today by its President and its Secretary General, my dear friend, Sébastien Touzé) and to the Chairmanship of the Committee of Ministers of the Council of Europe for their support for the European Social Charter. I would also like to extend our heartfelt gratitude to the three speakers:

- Prof. Ducoulombier who, in her presentation on "States' discretion in choosing their commitments", demonstrated that this margin is compatible with the exercise of sovereignty in an international context; she underlined the importance of the role of universities and education and research establishments (such as the International Institute of Human Rights or the Academic Network on the European Social Charter) in disseminating the Charter and the case-law of the European Committee of Social Rights. Indeed, it is essential to underline this academic resolved, and the positive political resolve of States when choosing their commitments, in the spirit of the important Political Declaration of the Committee of Ministers of October 2011 on the occasion of the 50th anniversary of the Social Charter, to encourage states which have not yet done so to ratify the revised Social Charter of 1996 and to accept the collective complaints procedure.

- Judge Ziemele spoke to us about "States' discretion in the implementation of rights", i.e. when the honouring of the commitments entered into by States is being verified or monitored. She gave examples of what I would call the "balanced and responsible exercise of subsidiarity", i.e. a margin of discretion that is offset by the judicial scrutiny exercised by bodies set up under the treaties adopted by the States themselves, i.e. the Court or the Committee. She also gave examples of what I would call positive judicial resolve to ensure interaction between the judicial bodies (the Committee, the European Court and the Court of

Justice) and the other institutions and monitoring bodies of the Council of Europe, as well as the other international human rights bodies. And, of course, I must mention the equally important role played by other protagonists in the Social Charter system, i.e. social partners and NGOs. We are working together to achieve a common goal: the effective application of the rights enshrined in the Social Charter to the daily lives of millions of people in Europe.

- Finally, Mr Giakoumopoulos, Director of Human Rights, spoke on the subject of "States' discretion in achieving the compliance of national situations", in other words, after the situation has been monitored by the European Committee of Social Rights. He gave what I would call a perfect example of an international approach and of the importance of the support provided by the Directorate General of Human Rights and the Rule of Law, through the work done by the Social Charter staff, which is all the more important given that the European Committee of Social Rights is not a permanent body.