The European Social Charter and the European Convention on Human Rights: prospects for the next ten years [1]

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It always needs to be borne in mind, in connection with both the Charter itself and its links to other European instruments, that it was seen from the outset as being closely bound up with the European Convention on Human Rights (hereafter the ECHR). There is clear evidence of this in the preparatory works, but two other specific illustrations may be cited. The first is the opinion of the then Consultative Assembly of the Council of Europe in September 1953 on the proposal to draw up a social charter. In it, the Assembly states that this charter should "form a pendant to the Convention on Human Rights and Fundamental Freedoms". The second illustration concerns the Committee of Ministers. In its special message to the Assembly in May 1954, in which it laid down the functions of the new intergovernmental Social Committee that would be responsible for drafting the Charter, it said that the new instrument would be "complementary" to the ECHR in the social field.

The conclusion to be drawn from these policy statements is that any difference between the two treaties could only concern their area of activity or focus: civil and political rights on the one hand, social rights on the other. In contrast, the forms of safeguard provided should be more or less the same, or at least comparable.

As we know, the negotiations that led to the European Social Charter resulted in a different outcome. In terms of enforcement and international monitoring, the treaty adopted in Turin in 1961 was but a pale imitation of its 1950 predecessor. The arrangements for guaranteeing the rights it was supposed to protect were extremely loose. They were based solely on the examination, by a committee of independent experts, of reports submitted at regular intervals by governments. Such a system is light years away from the genuinely judicial machinery of the ECHR. Moreover, this report-based monitoring system immediately ran into difficulties that left it almost impotent. It is hardly surprising that at an inter-regional meeting organised by the Council of Europe in January 1993, the then Secretary General, Mrs Lalumière felt able to describe the Charter as the "poor relation" of the Convention, and a "paper tiger".

This was the situation that the "fresh impetus" process set out to remedy, in the form of a series of legal instruments whose flagship was the revised European Social Charter (hereafter the revised Charter). It now needs to be asked whether this new treaty has succeeded in changing the relationship with the ECHR and whether it offers useful guidelines on how this relationship might further evolve.

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[1] As far as possible, this text reflects the oral presentation at the ceremony to mark the tenth anniversary of the signing of the revised Charter. The main consequence is that there are few references to legal specialists and existing case-law.

At first sight, this does not appear to be the case. To start with, the revised Charter had a different objective, namely to update the list of guaranteed rights, either by redefining existing ones or by adding new ones. Naturally, such a process could have drawn on the experience of the ECHR and, in particular, the case-law of the European Court of Human Rights. However, those involved in the redrafting chose a different approach. Their sole European source of inspiration was European Union law. For example, they drew on, and occasionally adapted, various Community directives to define employees' right to information on the conditions governing their contract or employment relationship (Article 2§6 of the revised Charter), protection of their claims in the event of the insolvency of their employer (Article 25) and protection in the event of collective redundancy (Article 29).

It is only a short step from there to concluding that there are still two parallel systems governed by a process of separate development. The two supervisory bodies may encourage such a conclusion by themselves appearing to subscribe to this approach. Thus the Court has occasionally argued that a particular right is protected by the Charter to justify its exclusion from the scope of the ECHR, as, for example, in the *National Union of Belgian Police* case in 1975. Similarly, the European Committee of Social Rights sometimes reminds states that quote the Convention as grounds for exemption from their Charter obligations that the two are quite distinct.

However, this temptation must be resisted as the ECHR has never been totally absent from the Charter's sphere of activity. Depending on the protagonists and the circumstances, it may sometimes cast an inhibiting shadow over the latter and on other occasions serve as an ideal to be emulated.

In recent decades, the latter seems to have carried more weight. This emerges from the activities of the European Committee of Social Rights, to which we will return. However, the same trend can be seen in various proposals and discussions about a possible or desirable evolution of the Charter. These are not new proposals. Their main purpose is to secure Court protection for social rights, or at least some of them. Failing that, they would like to see the transformation of the European Committee of Social Rights into a parallel court. This option was raised in Parliamentary Assembly recommendations 1354 (1998) and 1415 (1999) and has reappeared in recent deliberations of the Steering Committee for Human Rights. These institutional processes have to be seen in the context of developments in the European human rights machinery itself and its basic precepts, in their current form as defined by legal authorities. On the one hand social rights have made increasing inroads into the human rights field[2], but at the same time the Court has been very reluctant to accept responsibility for all the rights embodied in the Social Charter, even though changes in its approach to and methods of interpretation might allow it to do so[3].

This reluctance, which highlights the limitations of the interpretative approach, is the main reason why consideration needs to be given to changing the social rights protection machinery in the relevant treaties and explains the proposals and discussions referred to earlier. These have one particular aspect in common. They are based on the notion that the now generally accepted principle of the indivisibility of human rights implies a unified system of rights, and thus of instruments and machinery to safeguard them.

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[2] See, in particular, F. Sudre: "La perméabilité de la Convention européenne des droits de l'homme aux droits sociaux", in Mélanges J. Mourgeon, Bruylant 1998, p. 467 ff.

[3] See Professor Sudre's particularly stimulating study: " La protection des droits sociaux par la Cour européenne des droits de l'homme: un exercice de jurisprudence fiction", *Rev. trim. dr. h.,* 2003, pp. 755 ff.

While acknowledging that this is an ideal to aim at, it will not be considered in the discussion that follows. It is not possible to incorporate social rights into the ECHR or to establish a European court of social rights without a revision of the existing European human rights treaties, an option that the organisers of this meeting excluded from the outset from the range of possible developments of the revised Charter over the next ten years. The author will not discuss this exclusion. Perhaps, as the situation is perceived within the Council of Europe, member states are not ready for such a change and still more time is needed to prepare them for it.

Any attempt to find ways of strengthening and widening the links between the ECHR and the Social Charter must therefore be strictly related to the instruments currently in force. The exercise will consist of identifying and exploiting existing opportunities. Such an approach clearly implies a narrow and difficult path, but it is not impossible. Without amending the treaties, it is still possible for the relevant bodies of the Convention and the Charter, and more generally of the Council of Europe, to seek ways of achieving a common approach to safeguarding rights (I), and of establishing institutional and procedural links between the two systems (II).

I- Developing a joint system of safeguards

Three factors underlie this issue. The first is that the Charter and the ECHR remain distinct instruments based on separate systems. The second is that they have the same object, which is to provide effective protection for human rights. The third is that the Charter is some way behind the ECHR. One conclusion to be drawn is that developing the Charter system so that it offers a similar level of protection to the Convention might help to bring the two instruments into line. The author believes that this is a necessary condition for closer interaction between the two systems.

The issue of interpretation is crucial if such an outcome is to be achieved. In the current situation it provides the only key to the emergence of a common approach.

A- Reinterpreting the Charter.

The development of the ECHR owes much to the dynamic interpretations of the European Court. The latter has expanded European law by adapting it to new circumstances and requirements, in response to changing social realities and constantly emerging challenges. The result has been to make the Convention a legal instrument with a life of its own. This process of change affects all areas of the Convention, and has particularly entailed a relative extension of its scope to social rights and an extraordinary development of procedural safeguards. It is hardly necessary to point out that this progress results from a combination of two factors, namely certain principles of interpretation, such as the effectiveness of rights, coupled with approaches that permit the logical development of the Convention's main concepts, in particular those of the autonomous nature of its precepts and positive obligations[4].

[4] See in particular: Frédéric Sudre, *A propos du dynamisme interprétatif de la Cour européenne des Droits de l'homme"*, JCP – La semaine juridique, Ed. gén., 11 July. 2001, p. 1365 ff; see also the previously referred to article by the same author. On positive obligations, see Akandji-Kombe, "*Les obligations positives en vertu de la Convention européenne des droits de l'homme*, Council of Europe Publishing, coll. Précis des Droits de l'homme, awaiting publication.

The conclusion to be drawn is that for the Charter itself to become an effective instrument for protecting social rights, the European Committee of Social Rights must show the same dynamism in its interpretations.

At first sight, this already appears to be the case. Several recent decisions under the collective complaints procedure give some weight to the notion of a significant convergence between the Committee and the Court with regard to their principles and methods of interpretation. Thus, in its very first decision - *International Commission of Jurists (ICJ) v. Portugal* of 1999, concerned with child labour[5] – the Committee stressed that the Charter was a human rights instrument. This principle has since been constantly reiterated, as has the notion that the Charter is concerned with practical rather than theoretical protection of rights. More recently, in its *International Federation of Human Rights Leagues v. France* decision in 2004, the Committee has cited the fact that the Charter was intended to complement the ECHR as a basis for its interpretative approach.

It is such principles, rather than just pious hopes, that underpin an evolution in the Committee's methods of interpretation, thus strengthening the requirements the Charter places on states party. More precisely, in accordance with the effectiveness principle, the Committee has started to impose on states an obligation to secure certain results where it might have been thought that they were simply required to make available certain resources. This is the case with child labour. In the *ICJ v. Portugal* decision, for example, it found that the state's obligation to make 15 "the minimum age of admission to employment" required it not only to introduce relevant legislation and regulations but also to prevent unlawful employment in practice, or at least penalise it in domestic law. Similarly, in the *International Association Autism-Europe v. France* case, the Committee found that laws and regulations alone were not sufficient to meet the requirements of Article 15§1, according to which states must "take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private". Measures taken must be designed to meet the objective specified in the Charter and must have the desired effects, having regard to this objective.

The close relationship between the Charter and the ECHR has also resulted in some of the provisions of the former, such as the non-discrimination clause, being interpreted in accordance with the equivalent Convention provisions. The aforementioned *Autism Europe v. France* case is an illustration of this. It has also served as a basis for the Committee's attempts to circumvent some of the Charter's blind spots. This applies particularly to the gradual extension of its personal scope, as we shall see.

It is therefore worth asking whether the development of a common approach to defending rights must still be seen as an objective to be achieved in the next ten years. The answer is probably "yes", for one key reason, namely that the progress just described is far from fully established. It remains fragile, and faces threats from all sides.

Firstly, these come from within the European Committee of Social Rights. Close consideration of its findings since the revised Charter came into force sometimes raises the question of whether they really constitute a body of case-law, in the sense of a relatively

[5] ECSR decisions are available on the Social Charter Internet site at the following address: http://www.coe.int/T/F/Droits_de_l%27Homme/Cse/. For an analysis, see the author's contributions in *Revue trimestrielle des droits de l'homme*: 2001/1035 ; 2003/113 ; 2004/225 ; 2005/673.

stable and clear set of solutions. Bold initiatives alternate with timid retreats as majorities fluctuate, showing clearly that we are far from even a minimum consensus in favour of the dynamic approach to interpretation recommended above.

What is particularly striking to those outside the system is the conjunction of what might be called the "forces of inertia". It is not they alone who create the Committee's case-law. Nevertheless they are a powerful element. At the risk of oversimplification, three main groups may be identified. Firstly, there are the "textual fundamentalists", for whom judicial rigour must equate with literal and historical interpretation. Any deviation from the letter of the Charter is simply a dangerous approximation. Secondly, there are the "progressives", for whom the Charter is simply a guide to social policies and who therefore advocate the greatest possible flexibility in the monitoring process. For them, what is most important is that national situations should move forward, and that viewed from the standpoint of previous domestic law and practice countries should be seen to be "on the right path". Finally, there are the "anti-fundamentalists" who – probably from intellectual inclination, since they mainly specialise in labour law – see the Charter not as an instrument for protecting human rights but more as a labour convention, which in turn affects their understanding of its contents.

Briefly, from the conclusions reached by the Committee, the impression is sometimes given that the Charter has not altered. It is as if the fresh impetus process had never taken place, and as if the aims expressed in the associated treaties, such as "the indivisible nature of all human rights" in the preamble to the revised Charter, or the "effective enforcement of ... social rights" in the preamble to the Collective Complaints Protocol, were not intended to have any legal consequences.

It must be borne in mind in making these comments that even more than other international bodies, including the European Court, the European Committee of Social Rights is subject to major legal and political constraints. For example, one factor to take into account is the fact that ratification of the revised Charter and the Collective Complaints Protocol is still not complete. Another is the need for the Committee's decisions to be accompanied by a broad measure of legal and political consensus to ensure that they are properly enforced. Finally, there is the obligation, on which there is less agreement and which arises from the relevant texts, to base it decisions on the law.

But even if these constraints may explain some of the tendencies referred to above, their impact must not be exaggerated. These factors do not explain everything. Intellectual habits might have just as much impact, and there is also the matter of the criteria and methods currently used for appointing members of the Committee. Be that as it may, these constraints are not a bar to any sort of progress in the Committee's case-law and do not justify an extreme form of conservatism.

Nor is the limited progress achieved by the ECSR over the last ten explicable purely in terms of its inconsistent case-law or the forces at work within the Committee. At least part of the responsibility lies with the attitude of the Committee of Ministers. As one of the Charter bodies, and particularly in connection with the collective complaints procedure, the latter must respond to ECSR decisions by means of resolutions, and where a violation is found it must recommend to the country concerned whatever measures it considers appropriate to bring the domestic situation into line with the Charter. This is not the place to dwell on the

equivocal way in which it performs this function[6]. It is simply worth noting that the Committee of Ministers appears to interpret its powers as not only requiring it to ensure that ECSR decisions are properly enforced at national level but also allowing it to re-examine these decisions in the manner of a court of appeal. This highly original and debateable interpretation of the relevant treaties led, in the first 35 hours case (*CFE-CGC v. France*, 2000), to the Committee partially overturning the finding against France. Such a practice will inevitably compromise the authority of the ECSR's legal assessments and undermine its legitimacy. It must not therefore be allowed to continue. In this regard, the Committee of Ministers' own position remains ambiguous. It has admittedly refrained since the first 35 hours case from making legal assessments of ECSR decisions. But in the second of these cases (*CFE-CGC v. France*, 2005), it also failed to subscribe formally to the European Committee's interpretation of the relevant parts of the 1995 Protocol that it alone had jurisdiction to assess the compatibility of national legislation, regulations and practice with the Charter. It is time to end this equivocation.

It now needs to be decided on what parts of the revised Charter this interpretation should be based - assuming that the conditions for lasting progress of Charter case-law are met, namely, that the ECSR is prepared to give full meaning and effect to the goals the Charter has assigned it while the Committee of Ministers agrees to adopt an attitude that is more compatible with the development of the ECSR's authority.

B- Desirable changes

Developing a shared approach to human rights protection means that all the Charter's substantive provisions must be interpreted in accordance with one of the principles already referred to, namely the effective protection of rights. It is unnecessary here to go beyond this general proposition. The European Committee of Social Rights must draw the practical consequences in each specific case it has to consider. The only issue that arises here is whether the Committee is committed to adopting and maintaining a dynamic policy of interpreting the Charter in accordance with its spirit – in other words its nature and aims – as much as its letter.

Clearly, the very nature of certain provisions of the Charter means that that they require particularly vigorous interpretation by the Committee. These are ones where there is blatant incompatibility with fundamental rights. Particular examples are the Appendix to the Charter and its Article I, which respectively restrict the Charter's personal scope by excluding foreign nationals and legitimise "minor violations" of established rights.

The author has already considered these provisions and their total incompatibility with a human rights instrument in some detail[7]. Nevertheless, the subject may bear brief repetition. According to the Appendix, the persons covered by the Charter "include foreigners only in so far as they are nationals of Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned". Meanwhile, Article I paragraph 2 stipulates that compliance with the undertakings deriving from various provisions of the Charter shall be regarded as effective "if the provisions are applied .... to the great majority of the workers

[6] See the author's previous writings on the subject.

[7] See "The material impact of the jurisprudence of the European Committee of Social Rights", in G. De Burca & B. De Witte, *Social rights in Europe*, Oxford University Press, 2005, p. 89 ff; and "La Charte sociale européenne et la promotion des droits sociaux", in *Les droits sociaux entre droits nationaux et droit européen,* Actes du colloque d'Aix, to be published by Bruylant.

concerned", which the ECSR initially interpreted to mean that the relevant requirements were met if the domestic measures concerned applied to at least 80% of workers.

In recent years, the Committee has made efforts to reduce the blind spots created by these two provisions. The author is one of those who consider that it has managed to strike a reasonable balance between respect for the letter of these exclusion provisions and the spirit of the Charter, which as a human rights convention should offer protection to all those coming under the jurisdiction of the states party. The approach taken in the *Autism Europe v. France* decision in 2004 is to rule that the clause in the Appendix is inapplicable if it is incompatible with respect for life and human dignity. It therefore confirms the validity of this provision while at the same time making the Charter applicable to foreign nationals in exceptional circumstances[8]. The same applies to Article I. What emerges from the decision in the first 35 hours case is that this article does not allow states to deliberately exclude groups of persons from the Charter's application. In other words, as the decision itself states, its application "cannot give rise to a situation in which a large number of persons forming a specific category are deliberately excluded from the scope of a legal provision".

Against this background, the challenge of the next ten years will be less concerned with the actual interpretation of these clauses than with stabilising and developing the relevant case-law.

These are the conditions that must be met for the Charter to begin to approach the standards set by the ECHR. Let there be no mistake however. It will not be able to match this standard until the two provisions referred to above, both of which are incompatible with human rights principles, are quite simply repealed, so that the protection afforded by the Charter extends to every individual coming under the jurisdiction of the states party.

II- Establishing institutional and procedural links between the Charter and the ECHR

Calls for a common approach to human rights protection in fact represent an invitation to develop processes that are already under way. However, this is not the case with this particular proposal. To date there have been no institutional or procedural links between the Charter and the ECHR. They therefore need to be established.

The main justification for such a development is that the existing system, in which each supervisory body does or does not take account of and interpret the other instrument as it thinks fit, appears to have reached the limits of its usefulness. It might even be considered harmful in that it could lead to situations where protection was not available. European citizens would then be the first "victims", which is quite inadmissible, even if the latter did only represent a very tiny minority.

There is nothing particularly original in the proposal. When the Charter was drawn up, plans already existed for international supervisory machinery that was not totally distinct from that of the ECHR. The preliminary draft Charter of 19 April 1957 envisaged an institutional approach, in which the then European Commission would be common to the two bodies. As we know, this view failed to gain acceptance. Nevertheless, the underlying logic still applies.

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[8] For a more detailed analysis of this decision and its implications, see by the same author: *The European Social Charter and protection of illegal immigrants*, Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, AS/Mig/Inf (2005) 17, 28 September 2005.

Co-operation between the two systems would serve two purposes. Firstly, it would be a way of combating an absence of remedies and thus a loss of protection. Secondly, it would reduce the risk of conflicts of interpretation and thus of differing case-law.

A- Combating an absence of remedies

Lack of awareness of the Social Charter and its supervisory machinery, coupled with the excessive prominence given to the Court, naturally means that applicants will submit their complaints to the latter rather than to the European Committee of Social Rights. This is perfectly understandable in the case of rights embodied in the 1950 Convention. But the Court Registry sometimes receives applications concerned with social rights, to which the Court tends to turn an unsympathetic eye. In 1999 for example, the *Paneenko v. Latvia* case, which alleged a violation of the right to work, was found to be manifestly ill-founded and therefore inadmissible. This same applied to *Salvetti v. Italy* in 2002, concerning entitlement to free medical assistance. Even when applications manage to pass the admissibility hurdle, it is still very likely, as in *Botta v. Italy* (1998), that the Convention provision relied on will be judged inapplicable. It might be thought that there is little here to justify reform. But in addition to these known applications, there may well be others. How many have failed to survive the pre-filter of the Court Registry because they were considered manifestly ill-founded? It would be interesting to know the figures to establish precisely the demand for social rights in Europe.

There is certainly nothing inevitable about this. As Professor Sudre has ably shown in a "case-law fiction" exercise[9], given the approaches to and methods of interpretation that it has developed, it would be perfectly feasible for the Court to accept such applications and protect the rights they claimed. Additional judicial and individualised protection would then be available for the majority of the rights embodied in the Social Charter. Incidentally, if such a situation came about and the Charter's own machinery remained in being, there would also be a still greater need for co-ordination. Clearly, though, the Court has currently no intention of moving in this direction. We must therefore return to our starting point, namely the current situation in which applicants are more likely to choose, in good faith, the Convention rather than the Charter route, even though the former is likely to end in failure and the rights they are seeking to protect are embodied in a Council of Europe treaty.

Others will object that the risk referred to here is purely theoretical, and that applicants before the European Court are not the same as those appearing before the European Committee of Social Rights. In the case of the Court, it is victims – usually individuals – who can exercise the right of application, whereas applicants to the ECSR are organisations, which do not have to show that they themselves have suffered harm. This seems to be a serious objection. However, it can be easily dismissed by two arguments.

Firstly, the notions of "collective" and "individual" interests are by no means totally incompatible. Applicants under the collective complaints system are individualised persons and only differ from the non-governmental organisations allowed to appear before the European Court insofar as the latter are required to have the status of "victims" of the alleged violations. Moreover, although complaints under the 1995 Protocol must refer to general violations, the latter may perfectly well concern identifiable persons, in other words, in the Committee's own words "groups of individuals". In theory, then, the distance that separates

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[9] Article referred to above, *Rev. trim. dr. h.,* 2003, p. 755 ff.

the collective complaints procedure from that of individual applications is perhaps not so great.

It is even less so in practice. It can be seen – and this is the second argument – that cases submitted to the ECSR frequently combine individual and collective elements. For example, it is not unusual – and this applies to all the French cases – for collective complaints to follow on from proceedings brought by individuals in the domestic courts. With this in mind, the Committee has noted in its admissibility decision in the *SAGES v. France* case (2004) that the 1995 Protocol does not make the presentation of complaints conditional on the exhaustion of domestic remedies. It is also interesting to note that in several cases, the complainant organisations have envisaged, in the event of failure and after exhausting all domestic remedies, bringing their cases before the European Court. The only reason why such a combination of approaches has not yet occurred is the inevitable time lag between the two types of procedure, itself a consequence of the exhaustion of domestic remedies condition applicable to the Court. It is almost certain however that it will happen in the near future, and perhaps even in a positive fashion since, as will be shown later, despite the Court's reluctance to involve itself with social rights, there are several points of overlap between the Convention and the Charter.

To return to the main proposition, certain measures need to be taken to avoid any loss of remedies, in other words to ensure that remedies can be used effectively, thus offering better protection for social rights.

The first might be to establish an operational body within the Council of Europe responsible for informing potential applicants to either the Court or the European Committee what each of them has to offer and, where relevant, advising on which procedure was the more appropriate for their circumstances and pointing them in that direction. If it fulfilled this role successfully, such a body could help to reduce the pressure on the Court by steering cases concerned with social rights towards the ECSR.

However, this approach is unlikely to resolve all the difficulties. It is likely that both procedures will continue to bar the door to certain applications, such as ones that rely on rights embodied in the Social Charter but outside the scope of the Convention, and that are additionally presented by the victims themselves. If a considerable number of such applications occur and they appear to point to a national situation that is out of step with the Charter, a particular Council of Europe authority, such as the Commissioner for Human Rights, might be empowered to refer the matter to the ECSR, under either the collective complaints or the reporting procedure.

B- Means of limiting the risk of conflicts of interpretation

The main reason for establishing links between the Charter and the Convention is that there are already overlaps between them – indeed between the two systems – which their case-law has tended to amplify.

Certain rights appear in both systems. Examples include the ban on forced labour, which is laid down explicitly in Article 4 of the Convention and implicitly in Article 1§2 of the Charter as interpreted by the ECSR, the right to organise and form trade unions, which appears in Article 11 of the Convention and Article 5 of the Charter, and the right to social security and social assistance, which is embodied in Articles 12 and 13 of the Charter and which the Court

has inferred from the right to enjoyment of property (Article 1 of the first protocol to the Convention). The Committee has also tended to interpret the Charter in such a way as to make some of the rights embodied in the Convention, such as the right to private and family life, the prohibition of ill-treatment and the right to freedom of expression, necessary extensions of social rights[10].

These overlaps should increase exponentially with the entry into force of Protocol No. 12 to the Convention[11]. As we are aware, this prohibits any discrimination in the exercise of rights, irrespective of whether these are enshrined in the Convention itself, other European or international treaties or domestic law. This means that any rights without exception embodied in the Social Charter will come within the purview of the Protocol and the European Court will have jurisdiction to hear allegations of discrimination in their exercise. The Charter itself already bans such discrimination regarding the rights it lays down. The danger then arises that case-law relating to the Charter, developed by two separate bodies whose approaches are not necessarily harmonised, might be at best inconsistent and at worst incompatible or conflicting. Such an outcome would affect our understanding not only of the non-discrimination principle but also of the Charter's basic provisions, because before any decision could be reached on whether discrimination had occurred it would be necessary to determine the nature and scope of the right in question.

In view of this danger, some have urged the establishment of a procedure for the Court to refer preliminary questions to the Committee. The idea is that each time the right that was the subject of an application was one embodied in the Charter, the Court would defer a decision and consult the ECSR, which would produce an interpretation that the European Court would then simply apply. The model on which these proposals are based appears to be that of preliminary rulings in the Community legal system.

Merely stating the idea thus highlights its inappropriateness as a solution to the problem. Although in Community law it is seen as a procedure for securing co-operation between two courts – or after certain innovations in the Treaty of Amsterdam, between two authorities, one of which is a court – the preliminary ruling procedure still essentially establishes a hierarchical relationship between two authorities belonging to the same legal order. The hierarchical nature derives mainly from the monopoly of interpretation (and/or of assessment of validity) granted to the body to which the matter is referred, and it is mainly justified by the need for consistency, and even unified application, of the law in a particular legal system.

None of these conditions are met in this particular case. The Charter and the Convention are autonomous international legal instruments that alone determine the powers of the bodies established under them. There is no place for such relationships in this context and it is difficult to imagine a body relinquishing part of its jurisdiction – as the Court would have to do – in favour of another whose existence and powers derive from a separate treaty. Given the current state of Council of Europe law, the only realistic approaches are co-ordination or, at best, voluntary harmonisation of their case-law. As things stand, neither situation applies.

One possible way of avoiding conflicting case-law might be to authorise the ECSR to intervene in proceedings before the Court and, similarly, the Court to take part in collective complaints proceedings. This would be possible using the third party intervention procedure,

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[10] See the author's works cited in note 7.

[11] See the article by Sudre referred to above, *Rev. trim. dr. h.,* 2003, p. 755 ff.

which both bodies formally recognise. Such a facility would be restricted to cases where the matter under discussion had a particular relevance from a Charter or Convention standpoint and the position taken by the third party would not be binding on the competent body. This innovation would not necessarily entail an amendment to the Convention. An appropriate interpretation of the words "any person concerned who is not the applicant" in Article 36 would suffice. It would in contrast be necessary to amend Rule 32 of the Rules of the European Committee of Social Rights to include the Court in the list of third parties entitled to intervene, but this should not in principle raise any difficulties since the Committee determines its own rules of procedure.

Such an arrangement would only work properly if there was a true spirit of trust and co-operation between the two bodies, given that third party intervention has to be triggered by the president of the relevant body and it is for the members to decide whether and how to take account of any written or oral observations. The effectiveness of the arrangement would therefore depend on the good will of the members of the Court and the Committee, and on the climate they succeeded in establishing between each other. To assist this process, it would probably be useful to introduce a form of institutionalised dialogue between them, based on the one that has operated for several years between the European Court and the Court of Justice of the European Communities.

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Here then are a number of working proposals. They make no claim to exhaustiveness. They could be extended to other areas. What is really important, though, is the spirit in which they are made and in which they might be implemented.

Firstly, establishing links between the Convention and Charter systems does not necessarily mean that perfect identity is required. Although much emphasis has been placed on the importance of raising the second system to the level of the first, certain aspects of the Charter clearly have a positive originality and must be safeguarded. They could even influence those who are required to consider the future development of the European Convention. Of particular relevance here is the supervisory machinery, and the advantages offered by a combination of a complaints procedure and a system of periodic reports on the whole range of parties' undertakings.

Secondly, it is perfectly desirable for the Charter to move forward on a pragmatic basis, so long as this is not a pretext for a surreptitious transfer of national powers to revise treaties to bodies that have no right to exercise them. In other words, there are limits to the pragmatic approach, which might otherwise encounter legitimate resistance from governments. To put it more positively, the response to the difficulties and shortcomings identified earlier must eventually take the form of a formal revision of the two treaties in question. The authorities concerned would therefore be well advised to start discussions and take action with this in mind.