The European Social Charter 60 years on – a Swedish perspective

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1. Introduction

The European Social Charter from 1961 and the European Convention on Human Rights (ECHR) from 1951 jointly provide the key instrument available to the Council of Europe. Civil and political rights are protected by the ECHR and economic and social rights by the European Social Charter (the "Charter"). The Charter has not been given as prominent a status as the ECHR, but this has not prevented it from growing in importance over the years and becoming more widely known.[1] In Sweden, too, the Charter has assumed a more prominent role.

The Charter is supervised by 15 independent experts from member countries of the Council of Europe, who form the European Committee of Social Rights (the "Committee"). As a member of the Committee in the period 2007-2018, I was able to observe how certain characteristics of the Swedish labour market model have affected Sweden's ability to ratify new provisions or comply with provisions already accepted from the Charter. I will review below some of these problems, while also giving examples of how issues could have been resolved through clearer explanations in Sweden's reporting and a more flexible approach from the Committee.

I will begin with a brief summary of the characteristics typical of regulation of the Swedish labour market. I will then continue with an account of Sweden's relationship with the Charter and examples of some issues where there has been a conflict between Swedish rules or

[1] References to the Charter appear, for instance, in the preamble to the Treaty on European Union (TEU) and in Articles 117 and 151 of the Treaty on the Functioning of the European Union (TFEU). The Court of Justice of the European Union (CJEU) refers to the Charter, for instance, in C-286/06 Impact, paragraphs 113-114. The European Court of Human Rights refers to the Charter, for instance, in Demir and Baykara v. Turkey, judgment 12/11/2008, Application No. 34503/97, paragraphs 45, 49, 103, 122, 149; the National Union of Rail, Maritime and Transport Workers v. the United Kingdom, judgment 08/04/2014, Application No. 31045/10, paragraphs 92 ff.

conditions and the Charter's requirements. This document is concerned only with the labour law rules contained in the Charter.[2, 3]

2. A Swedish model for labour market regulation

Through the 1906 December compromise, the main organisation of private employers (SAF, now SN) and the main organisation of workers (LO) recognised employers' company and labour management rights and the right of association. This paved the way for balanced development and co-operation between the social partners. There is a high level of organisation among both employers and employees. Although Sweden is now following an international trend towards declining union membership, the union organisation rate has stabilised at about 70 per cent.[4] The organisations are strong and well organised, with little fragmentation. The negotiating and collective bargaining system has been well established for a long time. Collective agreements cover around 90% of workers and virtually all professions – in both the private and public sectors – have their wage and employment conditions regulated by collective agreements.

The government's position has been that labour market conditions should primarily be regulated by independent social partners in collective agreements. In the 1970s, the tradition was broken whereby only certain fundamental issues should be regulated by labour law, and a number of labour laws were introduced. However, wage issues are still only regulated by agreements and minimum wage legislation is lacking. There is no mechanism available to extend collective agreements so that they apply to non-contracting parties. However, employers bound by collective agreements are considered to have an obligation to apply their terms to all their relevant employees, whether they are members of the contracting organisation or not. The right to take industrial action by trade unions is relatively extensive, particularly through the right to take sympathy action. It is the parties, primarily the trade unions, which are responsible for supervising compliance with the labour law framework. Supervision by the government only happens for specific issues.[5]

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[2] From this point onwards, when the Charter is mentioned, the Revised Charter of 1996 is meant.

[3] For an in-depth description and discussion about the attitude of the Nordic countries (Denmark, Finland, Norway and Sweden) to the Charter, see Nyström, B., "Europarådets Sociala Stadga och den nordiska arbetsmarknadsmodellen" [Council of Europe's Social Charter and the Nordic labour market model] in the Sui Generis commemorative publication for Stein Evju, Universitetsforlaget 2016, p. 522-532.

[4] Swedish National Mediation Office's annual report. Bargaining round and wage formation 2019, p. 166 ff.

[5] For more information about the Swedish model, see Sigeman, T./Sjödin, E, Arbetsrätten. En översikt [Labour law. An overview], Wolters Kluwer, 7th edition, 2017, p. 24-27; Adlercreutz, A./Mulder, B. J., Svensk arbetsrätt [Swedish labour law], Norstedts Juridik 2013 p. 34-36. For information about Sweden and the Nordic countries, see: Bruun, Niklas et al., Den nordiska modellen: fackföreningarna och arbetsrätten i Norden – nu och i framtiden [The Nordic model: trade unions and labour law in the Nordic countries – now and in the future], Liber 1990; Fahbleck, Reinhold, Industrial Relations and Collective Labour Law: Characteristics, Principles and Basic Features, p. 17-133, in Stability and Change in Nordic Labour Law, Scandinavian Studies in Law, Vol. 43, Stockholm Institute for Scandinavian Law, 2002; Nyström, Birgitta, The internal market and the future of labour

Fundamental rights in the labour market have only recently attracted any notable attention in Sweden. The modern welfare state has other means of protecting citizens and satisfying their rights. Traditionally, there is weak constitutional protection for human rights in Swedish law, but constitutional amendments in the 1970s introduced a series of rights in the second chapter of the Instrument of Government, including protection of freedom of association and the right to industrial action by trade unions.[6]

3. Sweden and the Charter's rules

Sweden ratified the 1961 Charter in 1962 and the revised Charter in 1998. Sweden has accepted 83 of the revised Charter's 98 points. Sweden has also accepted the collective complaints procedure.[7, 8]

A review of the provisions which Sweden has not ratified[9] indicates that they mainly relate to the areas of working hours, pay, working environment, protection for young workers, and for pregnant women and breastfeeding mothers. Sweden has primarily referred to the fact that these are issues which, according to Swedish labour market traditions, are regulated by the social partners in collective agreements (working hours and pay), or where Swedish legislation only sets certain frameworks which are then intended to be applied with collective agreement rules (e.g. the working environment). The State should not interfere in and the government cannot take responsibility for the content of collective agreements or their fulfilment. With regard to issues relating to pregnant women and breastfeeding mothers, the Swedish attitude

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law in Europe: Insights from the Nordic countries, European Labour Law Journal, Vol 1, No. 1, 2010, p. 7-18, especially p. 8-9.

[6] Nyström, B., "Ökad betydelse av svensk grundlag för att skydda grundläggande rättigheter i arbetslivet?" [Increased importance of Swedish constitution in protecting basic rights in working life?] in Carlson, L.,/Herzfeld Olsson, P./Pietrogiovanni, V., Labour Law and the Welfare State, Iustus 2019, p. 35-50.

[7] When Denmark, Finland, Norway and Sweden are compared, it is Denmark which displays the most cautious approach to the Charter. Denmark has not ratified the revised Charter, nor has it ratified the collective complaints procedure. Compared to the other countries, Denmark has accepted a smaller proportion of the Charter's provisions. Finland has accepted the most provisions compared to the other Nordic countries.

[8] See also Nyström, B., "The European Social Charter and Labour Rights in Times of Crisis" in Carlson, L./Edström, Ö/Nyström, B., Globalisation, Fragmentation, Labour and Employment Law. A Swedish Perspective, Iustus 2016, p. 81 ff.

[9] Sweden has not ratified the following provisions: Article 2, paragraph 1, reasonable working hours; Article 2, paragraph 2, public holidays with pay; Article 2, paragraph 4, provision for additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations; Article 2, paragraph 7, special benefits for night workers; Article 3, paragraph 4, promotion of occupational health services, Article 4, paragraph 2, increased pay for overtime; Article 4, paragraph 5, permitting deductions from wages; Article 7, paragraph 5, fair wage for young workers and apprentices; Article 7, paragraph 6, absences for young workers due to vocational training will be treated as forming part of the working day; Article 8, paragraph 2, ban on giving notice of dismissal to women during pregnancy or maternity leave; Article 8, paragraph 4, regulating night work for pregnant women and breastfeeding mothers; Article 8, paragraph 5, ban on pregnant women and breastfeeding mothers working underground; whole of Article 24 right to protection in cases of termination of employment; whole of Article 28 right of workers' representatives to protection and measures to enable them to carry out their functions within the company. Sweden has not accepted Article 12, paragraph 4, either, which applies to social security.

is that there is normally no increased risk and that there are also facilities for any appropriate measures in the individual case. General rules in this area are considered to constitute discrimination on the grounds of sex and as being out of step with a modern labour market. Most of the rules that Sweden has not accepted are rules which it has not wanted to introduce into national law.

In the light of the general Swedish approach to regulating the labour market, it is perhaps surprising that Sweden has ratified Article 4, paragraph 1, on wages which are sufficient for a decent standard of living. Sweden already approved this rule in the 1961 Charter, even though it did not approve other rules relating to pay. Article 4, paragraph 1, was considered to have a general character and content, which made it natural to comply with. Therefore, it was considered possible to accept Article 4, paragraph 1, without infringing the independence of the social partners. However, Sweden has previously been found to be in breach of Article 4, paragraph 1, but since Sweden explained how pay is regulated in the country and presented salary statistics, the Committee has found that it complies with Article 4, paragraph 1.[10]

Sweden has been found to be in breach of Article 4, paragraph 4, concerning a reasonable notice period, as some employees under the age of 30 who had at least five years' service were entitled to only a one-month notice period. In 2014, the Committee postponed its decision regarding Article 4, paragraph 4, because Sweden had provided in its report information on new collective agreement regulations on the issue, but the Committee requested information on this point in Sweden's next report.[11] In 2018, the Committee found that Sweden met the requirements of the Charter, but asked further questions for the next report.[12]

The Charter is regarded as the first internationally binding instrument to explicitly regulate the right to industrial action.[13] Sweden has had problems with the procedure for deciding on industrial action. The Committee considered that the requirement under the Swedish Co-determination Act (MBL, 1976:580) that only trade unions can decide on legal industrial action was contrary to the right to take industrial action under Article 6, paragraph 4, of the Charter. The Committee amended its practice on this point in 2004, stating that it was left to the individual states to decide, pursuant to Article 6, paragraph 4, which group should be entitled to call a strike.[14] In 2002, the Committee found that Sweden did not comply with Article 6, paragraph 4, through the rules of the Co-Determination Act on the notification sanction charge, which can be imposed if a party has not notified the state authority, the Swedish National Mediation Office, that it intends to take industrial action. The charge was considered

[10] Conclusions Sweden 2010, see also Conclusions XVIII-2 Denmark for Article 4, paragraph 1.
[11] Conclusions 2014 Sweden.
[12] Conclusions 2018 Sweden.
[13] See Evju, S., "The Right to Collective Action under the European Social Charter", European Labour Law Journal, Vol. 2 (2011) p. 196-224; Kovács, E., "The Right to Strike in the European Social Charter", Comp. Labour Law & Policy Journal, Vol, 26 p. 445.
[14] Conclusions 2004 Sweden.

too high, thereby making it an unauthorised restriction on the right to take industrial action. In its decision in 2010, the Committee revised its view and found that, given the resources of labour market organisations, this charge could not be considered too high. The Committee also noted that the notification sanction charge has so far been levied only once.[15]

Sweden has long had problems complying with Article 7, paragraph 9, on compulsory medical controls for young employees. The Swedish attitude is that a general obligation is unnecessary and medical examinations are only needed when there are specific risks involved.[16] Furthermore, Sweden has been found to be in breach of Article 8, paragraph 1, concerning paid compulsory leave before and after childbirth of at least 14 weeks. According to the Committee's interpretation, mothers must have at least six consecutive weeks off from work after giving birth. The Swedish view is that it is up to the individual woman to decide this, but in view of EU Directive 92/85/EEC on the protection of pregnant women and breastfeeding mothers, two weeks of compulsory leave before or after childbirth were introduced in 2000. In 2011, after Sweden presented its regulations on maternity and parental leave – which are very generous from an international perspective – and its statistics on leave, the Committee changed its assessment and held that Swedish conditions were sufficient to ensure that women are entitled to leave in connection with childbirth.[17]

Sweden has not accepted Article 28 of the Charter, as it has ratified Article 5, which protects trade union workers' representatives, and it considers that Article 28 therefore does not fulfil any function in Swedish law. Sweden has ratified Article 29, but has problems with it. There is no guarantee in Swedish law that collective redundancies cannot be made before the employer has fulfilled its obligations in terms of information and consultation.[18] Employers will be liable for damages if they have not informed and consulted (negotiated), but the redundancies are still valid.

Up to 2021, the Committee has made four decisions regarding collective complaints lodged against Sweden.

There was an early collective complaint, 12/2002 *Confederation of Swedish Enterprises v. Sweden*, where the Committee found that Sweden had breached Article 5 of the Charter on the right to organise. Collective agreements in the construction sector included organisation clauses. Such clauses requiring the employer to give priority to workers and jobseekers who are members of the contracting organisation are, according to the Committee, an interference with the right to organise itself. They restrict workers' free choice to belong or not belong to

[15] Conclusions 2010 Sweden.
[16] See, for example, Conclusions 2011 Sweden.
[17] Conclusions 2011 Sweden.
[18] Conclusions 2014 Sweden.

a trade union and to choose which association they want to belong to. These clauses have since been removed from the relevant Swedish collective agreements.[19]

It would be 10 years before a new collective complaint was brought against Sweden. The Committee's decision on this matter attracted a great deal of attention in Sweden. In collective complaint 85/2012, *Swedish Trade Union Confederation (LO) and the Swedish Confederation of Professional Employees (TCO) v. Sweden*, the Committee found that the changes to Swedish legislation which came about as a result of the ruling of the Court of Justice of the European Union in the Laval case[20] were contrary to the provisions of the Charter. The legislative amendments implemented, known as Lex Laval, meant that Swedish trade unions had the legal right, on the basis of industrial action, to require foreign service providers to sign collective agreements for posted workers only for minimum conditions and only for the limited number of conditions of employment laid down in the Posting of Workers Directive, referred to as the "hard core". Furthermore, industrial action was not permitted if the employer could demonstrate that posted workers already had, to a substantial extent, as favourable conditions as the minimum conditions laid down in the collective agreement. These restrictions meant that Sweden had breached Article 6, paragraph 2, of the Charter. The restrictions did not encourage voluntary negotiations between the social partners aimed at regulating the employment conditions in collective agreements. Sweden had also breached Article 6, paragraph 4, of the Charter by restricting the right to take industrial action. The Committee further concluded that Sweden had breached Article 19, paragraph 4a, by not guaranteeing equal treatment for posted workers in terms of pay and employment conditions. In addition, Sweden had violated Article 19, paragraph 4b, by not ensuring that posted workers were treated equally with Swedish workers in terms of benefits arising from collective agreements. As a result, and with no legislative changes made, Sweden was found not to be in compliance with the Charter at the time of reporting in 2014.[21] Since then, the Committee has followed up in 2017 and 2020 and found that legislative changes have been made in a positive direction, but that Swedish legislation does not yet meet the Charter's requirements. In its 2020 follow-up, the Committee noted that the implementation in Sweden of Directive (EU) 2018/957 amending the Posting of Workers Directive would entail substantial changes to the posting provisions.

During the period 2015-2019, four Swedish government inquiries and one ministry memorandum dealt with, among other things, the Committee's criticism of Lex Laval and Sweden's implementation of Enforcement Directive 2014/67/EU and Amending Directive (EU) 2018/957.[22] A complete revision of the Swedish Posting of Workers Act (1999:678) took place

[19] Conclusions 2014 Sweden, Assessment of the European Committee of Social Rights on the follow up (7 July 2016).
[20] Case C-341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet et al., ECLU:EU:C:2007:801.
[21] Conclusions 2014 Sweden.
[22] SOU 2015:83 Review of Lex Laval; SOU 2015:13 Enforcement Directive to the Posting of Workers Directive – part I; SOU 2015:38 Enforcement Directive to the Posting of Workers Directive – part II; Ministry Publication Ds 2016:6 Entreprenörsansvar och svenska kollektivavtalsvillkor vid utstationering [Contractor responsibility and

in 2020. One objective has been to achieve equal treatment as far as possible between posted and national workers and more consistency with the Swedish model of labour market regulation. The implementation of the Amending Directive has meant, for instance, that posted workers are entitled to a salary, not just the minimum wage, and that most employment conditions are to be treated equally in the case of long-term placements. However, the fact that only certain employment conditions can be enforced for posted workers and that certain employment conditions must, as before, be at a minimum level still imposes restrictions.

Collective complaint 99/2013, *Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden*, was based on the fact that Sweden does not have a conscience clause for healthcare professionals to allow staff with conscientious objections to refuse to perform abortions. The Committee stated that Article 11 of the Charter does not apply in this case. The primary aim of the Charter is to ensure access to appropriate care and, in the current situation, it is mainly pregnant women who should be protected. The only time before that the Committee had examined the issue of reasons of conscience in health care concerned the reverse situation; a conscience clause in Italian law was exercised in such a way that women were denied the abortion care to which they were entitled.[23] The present complaint against Sweden was found to be unfounded because the Charter did not apply in this situation.[24]

A new and interesting ruling is collective complaint 138/2016, *University Women of Europe (UWE) v. Sweden*. UWE contacted the Committee in 2016 with complaints concerning a number of countries, including Sweden, regarding shortcomings in equal pay for men and women and low female representation in decision-making posts and in decision-making bodies in the private sector. In its decision, the Committee found that Sweden was not in breach of Articles 4, paragraph 3, and 20.c and 20.d. This had been achieved through rules in the Swedish Discrimination Act (2008:567), employers' obligation to regularly record salaries, the work of the Equality Ombudsman, among other measures, with information and supervision, and the Swedish National Mediation Office's monitoring of wage trends between men and women. This has also happened through the Labour Court's assessments regarding salary comparisons, together with measures taken towards making wage comparisons and the

terms of Swedish collective agreements in the case of posting]; SOU:2019:25 Implementation of amendments in the Posting of Workers Directive.

[23] 87/2012 International Planned Parenthood European Network (IPPF EN) v. Italy.

[24] It may be noted that the Swedish Labour Court in AD 2017 No 23 tried a case where a midwife applied for several jobs, which she did not get. She had stated at the time of the application that, because of her faith, she could not participate in performing abortions. The Labour Court found that adopting a position not to participate in abortions, when manifested in refusal to perform an ordered task, was not an exercise of religion as protected by Article 9 of the ECHR. The midwife then appealed to the European Court of Human Rights and invoked an infringement of Article 9 of the ECHR. In a decision made on 12 March 2020, the European Court of Human Rights found the complaint manifestly ill-founded and that it must be rejected, Application No. 43726/17 Grimmark v. Sweden.

positive trend that can be seen in Sweden in terms of a reduced pay gap and female representation in different decision-making bodies.

4. Concluding comment

The Charter is a very important instrument, which has, unfortunately, assumed a rather obscure role in Sweden. It has always played a role in the Swedish legislative process, but has otherwise been almost unknown. However, some important recent decisions have made the Charter more central to the debate in Sweden.

There is a conflict between the Swedish attitude that the labour market should primarily be regulated by its social partners and demands in an international context for all workers to be protected by legislation. (This situation is clear not only in relation to the Charter.) However, it can be noted that over the years the Committee has gained a greater understanding of the fact that countries may have different systems to meet the requirements of the Charter. At the same time, the Swedish Government has recognised the need to be able to explain in various ways how the rules of the Charter are being complied with, even where the relevant provisions cannot be referred to directly in legislation. The Committee shows a great deal of flexibility on certain issues. This applies, for example, to Article 4, paragraph 1, where the Committee has accepted different types of data on remuneration for countries where there is no minimum wage legislation or official wage statistics. This has included the Committee accepting statements for salaries in specific sectors and examples of minimum wage regulations in collective agreements. In its reports, Sweden has also increasingly tried to portray the situation through statistics, examples of collective agreement regulations, etc.

However, the Swedish attitude cannot be linked on all issues to the conventional way in which the labour market carries out regulation and to the position of the social partners. There are also issues where national rules do not comply with the Charter's requirements. Furthermore, a Swedish attitude has also seemed to be prevalent that in a modern labour market with an advanced regulatory system, there is no need, for instance, to ban underground work for pregnant women or have compulsory medical examinations for young workers.

One decision which has attracted particular attention in Sweden is the Committee's ruling on Lex Laval. There was considerable discussion about this as part of the public debate in Sweden and it has been taken into account when drafting the legislative changes made to the rules on posting workers and industrial action in Swedish law. However, there is still some discrepancy between the requirements of EU law and those of the Charter, which has so far prevented Swedish law from fully complying with the Charter, and the Committee's criticism of this remains to a large extent. The Swedish Posting of Workers Act (1999:678) was revised in its entirety in 2020[25] as part of implementing Amending Directive 2018/957/EU, whereby

[25] SFS 2020:594.

Sweden has moved even closer to meeting the Charter's requirements. However, Sweden cannot – if it wants to comply with EU law – achieve this completely. The EU Posting of Workers Directive aims to provide employers who post workers with predictability in terms of the legislative rules in the country of work to be applied to the posted workforce. The idea is not to treat posted workers on an equal basis with national workers, although Amending Directive 2018/957/EU gives workers an increased right to equal treatment. Therefore, Sweden is unable to comply with EU law while complying with Articles 19, paragraph 4a, and 19, paragraph 4b, of the Charter. Nor is it able to fully comply with Article 6, paragraph 2, and Article 6, paragraph 4, due to the restrictions imposed by the Posting of Workers Directive on the regulation of the employment conditions for posted workers.

The possibility of having a case heard by a qualified international body without having to resort to time-consuming and costly procedures before national authorities or courts has been recognised as a strength of the collective complaints procedure.

The European Social Charter is an important, active international instrument which has a vital role to play in terms of ensuring fundamental rights in the labour market. During the latter part of the 60 years it has now been in existence, the Charter has become more widely known in Sweden. As the interest in Sweden in fundamental rights in the labour market has grown, there is hope of a further increase in interest in the Charter.