

# Chapter 9. The Methods for Interpreting the European Social Charter

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Interpretation is the fundamental role of a judge, a court, a tribunal or other adjudication body, the process of determining the meaning of a legal document for the purpose of applying it to the situation before them. The approach to this process, that is, the method of interpretation, is decisive for the result.

In the world of international treaties, the processes and methods of interpretation have increased in significance due to the variety of levels of regulatory bodies and the different cultures and socio-political contexts behind the text of the treaty. The requirement of accurate and adequately nuanced interpretation is particularly important in the case of international treaties that grant social rights, where it is necessary to convert the broad, generalized phrasing typical of such treaties into concrete obligations and effective rights. The special nature of the European Social Charter – primarily the dynamic and progressive quality of its provisions, coupled with the collective nature of the rights it guarantees – is significant in determining the method of its interpretation.

Aware of the overlaps between specific and horizontal issues, this chapter focuses on the horizontal issue of the methods of interpreting the Charter and does not engage in matters closely related to but beyond the method of interpretation (such as implementation, restrictions and definitions of elements of provisions).

The Vienna Convention on the Law of Treaties<sup>1</sup> (VCLT) lays down the basic norms for the interpretation of international treaties. Within this framework, Part I of this chapter describes the nature, purpose and objective of the Charter as an international human rights treaty and the nature of its supervisory body, the European Committee of Social Rights (ECSR, or Committee), which is authorized to give legal interpretations of the text. Part II gives an overview of the governing principles of such interpretation as laid down by the ECSR on the basis of the VCLT. Then, practical elements of interpretation are explained: the limits of the jurisdiction of the ECSR are set out in Part III, followed by issues of the process and sources of the jurisprudence developed by the ECSR in Part IV. Brief concluding remarks close the chapter.

## I. THE NATURE OF THE CHARTER AND ITS SUPERVISORY BODY

According to the VCLT, an international treaty has to 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<sup>2</sup>.

### A. THE NATURE AND PURPOSE OF THE CHARTER

The European Social Charter is a human rights treaty designed as a complement to the European Convention of Human Rights, with the purpose of applying the Universal Declaration of Human Rights in the context of Europe. This definition outlines its object, broader purpose and context and constitutes a framework for interpretation.

Its nature and objective as a human rights instrument is defined by the universality, indivisibility, interdependence and interrelatedness of human rights, set out in the 1993 Vienna Declaration of Human

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<sup>1</sup> Adopted in Vienna, 23 May 1969, entered into force on 27 January 1980, UNTS vol. 1155, p. 331.

<sup>2</sup> *Ibid.*, Article 31(1).

Rights, which emphasizes the international community's obligation to treat all human rights – which are interdependent, interrelated and indivisible – “on the same footing and with the same emphasis”<sup>3</sup> regardless of their political, economic and cultural systems. The indivisibility of human rights and the duty to promote and protect all human rights and fundamental freedoms “be they civil, political, economic, social or cultural” is reinforced in the Preamble to the Revised European Social Charter<sup>4</sup>.

The operational framework of the Charter is Europe, both the “broader” Europe consisting of the 47 member states of the Council of Europe and the “narrower” one consisting of the 27 member states of the European Union. The Committee repeatedly recalls the common values of the continent that connect and are shared by both the “broader” and the “narrower” Europe and that inspired the adoption of the Charter, namely dignity, autonomy, equality and solidarity<sup>5</sup>. Adherence to these shared values can provide a common ground for fulfilling the obligations and guaranteeing the rights laid down in the Charter by States with a variety of cultures and social, political and economic conditions. Compared to scope of application global treaties, which needs to accommodate different levels of development, the narrower spectrum of differences in the regional context permits interpreting human rights standards in a levelling up way, resulting, to a great extent, from the collaborative impact of the Convention and the Charter.

The overlap with the European Union in terms of the similarity or equivalence of certain rights in the two otherwise distinct regimes opens opportunities for enhancing the efficiency of rights protection under the Charter, as well as for the completion of the EU's human rights project. Furthermore, the ongoing steps towards filling the European Pillar of Social Rights [EPSR]<sup>6</sup> with content promote this common approach.

The Charter is a legally binding document, setting out obligations for the ratifying states to ensure the effective exercise of the rights they recognize. The required actions differ according to the nature of the provision and of the obligation.

When welfare rights are, to some extent, dependent on the resources of the country, the country is obliged to make permanent progress using all available means (obligations of means), while provisions ensuring fundamental human rights (such as non-discrimination, prohibition of child labour, the freedom of choosing an occupation, protection of employees in case of pregnancy, dignity at the workplace and the right to organize and to strike) generate immediate obligation to guarantee the given right (obligations of result<sup>7</sup>). This difference does not affect the legally binding nature of the provisions. However, it underlines the importance of interpretation, which requires a nuanced assessment of this distinction and an adjusted assessment of the required measures and progress. Over time, the ECSR's progressive method of interpretation has gradually converted formerly loose programmatic norms into accountable obligations comparable to those “of result”.

Most of the obligations – whether aimed at progress or result – require positive action by states to achieve the full exercise of the rights by everyone without distinction. The erosion of the former hierarchical distinction between “positive” and “negative” rights can also be detected in the interpretation of the European Convention on Human Rights (ECHR). It is commonly accepted today that so-called negative rights (freedom rights) require not only restrictions on interference by the state but also positive actions to protect and fulfil them, thus bringing the two instruments and their interpretative methods closer to each other.

Last but not least, the collective nature and objective of the rights under the Charter require specific methods of interpretation. The collective nature of the whole Charter – i.e., having the objective of achieving a legal and factual protection of the fundamental human rights and welfare rights in respect of

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<sup>3</sup> Vienna Declaration and Programme of Action, UN General Assembly, 12 July 1993, (Part I, No. 5).

<sup>4</sup> ESC (rev), Preamble § 4.

<sup>5</sup> ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, complaint No. 14/2003, decision on the Merits of 8 September 2004, § 29.

## **6 The European Pillar of Social Rights in 20 principles. Proclaimed on 17 November 2017 by President Juncker.**

<sup>7</sup> Matti MIKKOLA, “Need to Strengthen the Monitoring Mechanisms of Social Human Rights” and Regis BRILLAT, “Division of Social Human Rights into Fundamental Rights and Social/Welfare Rights” (both) in, *Reform of the European Social Charter* (Seminar Presentations) (eds.), Niko JOHANSON and Matti MIKKOLA. Ministry of Foreign Affairs of Finland – Porvoo, Bookwell, 2011, p. 28, pp. 47-48.

whole groups (classes) of the society – needs adequate interpretation, primarily under the collective complaints system but also beyond this, to promote the effective exercise of rights by all in the Contracting Parties.

## B. THE NATURE OF THE ASSESSING BODY AND ITS INTERPRETATION

Interpreting the Charter is the function of the ECSR<sup>8</sup>, a body of 15 independent experts in the area of social and labour law, who are bound by an oath of impartiality. Its members are elected by the Committee of Ministers of the Council of Europe<sup>9</sup> for a term of office of six years, which is renewable once.

The function of the ECSR is to “assess from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned”<sup>10</sup>. It rules on the conformity of the law and practice of the States Parties with their undertakings under the Charter, either in “Conclusions” (in the framework of the reporting procedure) or in “Decisions” (under the collective complaints procedure). Former disputes about the interpretative function of the ECSR and the Governmental Committee<sup>11</sup> have been clarified by the European Social Charter (ESC) Article 27 § 3 as amended by the 1991 Turin Protocol: the Governmental Committee prepares the decision of the Committee of Ministers “on the basis of social, economic and other policy considerations” (and not legal ones).

The ECSR has had the status of a quasi-judicial body<sup>12</sup> since the beginning of the reporting system, and this status was strengthened by the Collective complaints Protocol. The ECSR felt empowered to expressly declare, “It is clear from the wording of the Protocol (...) that only the European Committee of Social Rights can determine whether or not a situation is in conformity with the Charter.”<sup>13</sup> The new role of the ECSR had a visible impact on its methods of interpretation. Energized by the subsequent revision of the Charter and the increased interaction between it and the ECHR, the ECSR’s process and method of interpretation evolved to become increasingly reliant on and similar to the methods of interpretation of the European Court of Human Rights ECtHR<sup>14</sup>. The judicial nature of the ECSR received explicit confirmation from the ECtHR in the *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* case. In response to the claim of the defendant, the Government of the United Kingdom, that “the ECSR did not possess judicial or quasi-judicial status”<sup>15</sup>, the Court cited its own earlier statement on the ECSR but changed the earlier wording “particularly well-qualified committee” (acknowledging its expertise) to “particularly qualified body”, indicating the judicial quality of the ECSR<sup>16</sup>.

Despite criticisms of the collective nature of the complaints system (i.e., the lack of opportunity of individual complaints) and the lack of power to order effective remedies<sup>17</sup>, the quasi-judicial nature of the decisions and the role of the Committee has been acknowledged as similar to the role of other international human rights tribunals<sup>18</sup>. Finally, two relatively recent references by the ECtHR to the “relevant case law”

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<sup>8</sup> By this name since 1998, previously the “Committee of Independent Experts”.

<sup>9</sup> The only provision of the 1991 Turin Protocol which is not yet applied is the election of the ECSR by the Parliamentary Assembly, ESC Article 25(1).

<sup>10</sup> ESC, Article 45(2) as amended by the Turin Protocol.

<sup>11</sup> Cf. Klaus LÖRCHER, “Interpretation. Chapter Two”, in *The European Social Charter*, Oxford, Hart, 2007, p. 44.

<sup>12</sup> Stefan CLAUWAERT, “The Charter’s Supervisory Procedures” in *The European Social Charter*, Oxford, Hart, 2007, p. 127.

<sup>13</sup> ECSR, *Confédération française de l’Encadrement CFE-CGC v France*, complaint No. 16/2003, decision on the merits of 12 October 2004, § 20.

<sup>14</sup> A milestone example is the reference in ECSR, *Autisme Europe v. France*, complaint No. 13/2002, decision on the merits of 4 November 2003, § 52 to the innovative interpretation of the concept / principle of “equality” in the case ECtHR, *Thlimmenos v. Turkey* [GC] 6 April 2000, No. 34369/97, § 44).

<sup>15</sup> ECtHR, 8 April 2014, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, No. 31045/10, § 94.

<sup>16</sup> *Ibid.*, referring to § 39 of ECtHR, 21 February 2006, *TİM Haber Sen and Çınar v. Turkey*, No. 28602/95.

<sup>17</sup> Cf. Tonia NOVITZ, “Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter”, *European Human Rights Law Review*, vol. 1, 2002, pp. 50-66.

<sup>18</sup> Holy CULLEN, “The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights”, *Human Rights Law Review*, vol. 9, no. 1, 2009, pp. 63, 90.

of the ECSR<sup>19</sup> (a phrase not used previously) leave no doubt as to the acknowledged judicial nature of the Committee.

This chapter focuses predominantly on the interpretative methods developed by the ECSR in its case law in the form of decisions adopted on the merits of collective complaints. Statements of interpretation also have a meaningful role as sources for the development of the ECSR's interpretative methods, and conclusions on national reports are referred to occasionally.

## II. THE PRINCIPLES GOVERNING THE INTERPRETATION OF THE CHARTER

In the first three decades of its supervisory work based on the governmental reporting system, the ECSR has developed a considerable body of interpretative text on the provisions of the Charter. The quasi-judicial role assigned to the ECSR by the Collective complaints Protocol and the fundamental human rights issues raised by the complaints have led to the crystallization of a set of principles and general rules of interpretation.

These principles of interpretation of the Charter centre around and were developed predominantly from the key decision of the ECSR in the *FIDH v. France* case<sup>20</sup>. This case presented the Committee with a crucial human rights issue concerning children, excluded from the personal scope of the Charter, who were in precarious situation, deprived of medical and social assistance, exposed to risks to their life, health and physical integrity. That case triggered the first reference to the VCLT and its principles and to a concise enumeration of the main values permeating the case law of the ECSR. The situation prompted the body to adopt a wider interpretation of the Appendix on the personal scope of the Charter, seemingly *contra legem*, while in substance corresponding to the principles and values expressed in the VCLT and the 1993 Vienna Declaration.

26. The present complaint raises issues of primary importance in the interpretation of the Charter. In this respect, the Committee makes it clear that, when it has to interpret the Charter, it does so on the basis of the 1969 Vienna Convention on the Law of Treaties. Article 31 § 1 of the said Convention states:

‘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.’

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. The rights guaranteed are not ends in themselves, but they complete the rights enshrined in the European Convention of Human Rights.

28. Indeed, according to the Vienna Declaration of 1993, all human rights are “universal, indivisible and interdependent and interrelated” (§ 5). The Committee is therefore mindful of the complex interaction between both sets of rights.

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 main principles that determine the methods of interpretation of the Charter and that were generated by this decision are presented in the following order: A. Teleological approach. B. Governing values (dignity, equality, autonomy, solidarity). C. The Charter as a living instrument.

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<sup>19</sup> ECtHR, 2 October, 2014, *Veniamin Tymoshenko and Others v. Ukraine*, No. [48408/12](#), § 44; ECtHR, 20 November 2018, *Ognevenko v. Russia*, No. 44873/09, § 25.

<sup>20</sup> ECSR, *FIDH v. France* (No. 14/2003), *cit.*

## A. TELEOLOGICAL APPROACH

Under VCLT Article 31 (1), the terms of a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the given treaty.

The object and purpose of the Charter is defined by its nature as a human rights treaty with the purpose of applying the Universal Declaration of Human Rights within Europe as a complement to the European Convention on Human Rights<sup>21</sup>. This goal places the teleological approach at the top of the principles of interpretation.

The developing links between the jurisprudence of the ECSR and that of the ECtHR, have provided an impetus for the teleological methodology<sup>22</sup>. Teleological interpretation may be defined as the “anchor” of the ECtHR’s interpretation, indeed guidance given by the ECtHR indicates that when multiple meanings can be attributed to the words of a treaty, “it is ... necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties”<sup>23</sup>.

This summary of the teleological approach played a role in all later decisions, widening the meaning of Appendix paragraph 1 on the personal scope based on the precedent of the *FIDH v. France* decision<sup>24</sup>. The purposive approach not only prevents a narrow and restrictive interpretation but also aims at a broad and inclusive method and result. As the Committee has repeatedly underlined, “one of the underlying purposes of the social rights protected by the Charter is to express solidarity and promote social inclusion.”<sup>25</sup>

Cases on equal treatment specifically demonstrate the purposive interpretation of Article E, adopted as a separate article not only with regard to its highly important function concerning the principle of non-discrimination but also to achieve the effective equal enjoyment of all rights by obliging states to accommodate differences.<sup>26</sup>

The influence of the principle of teleological interpretation in paving the way towards achieving the goals and objectives of the Charter can be seen in other interpretative practices, mainly when the deciding to narrow or broaden the application of a provision. Some of these will be discussed later in this chapter (e.g., those connected to the scope of certain provisions), here the “collective nature” of complaints might be mentioned. The Collective complaints Protocol presented the Committee with the task of interpreting this admissibility requirement when a complaint refers to individual cases. The Committee’s nuanced interpretation separated admissible complaints, whereby the individual cases illustrated or exemplified a general problem of non-compliance by the country<sup>27</sup>, from complaints where the infringement of individual rights does not follow from applicable national rules<sup>28</sup>.

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<sup>21</sup> ECSR, Conclusions XVIII-1 (2006), Statement of interpretation of a general nature, reiterating the words of § 27 of ECSR, *FIDH v. France*, *cit.*

<sup>22</sup> Steven C. GREER, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge, CUP, 2006, p. 195.

<sup>23</sup> ECtHR, 27 June 1968, *Wemhoff v. Germany*, No. 2122/64, § 8.

<sup>24</sup> ECSR, *Defence for Children International (DCI) v. The Netherlands*, complaint No. 47/2008, decision on the merits of 20 October 2009, § 36; ECSR, *Defence for Children International (DCI) v. Belgium*, complaint No. 69/2011, decision on the merits of 23 October 2012, § 30; ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, complaint, No. 114/2015, decision on the merits of 24 January 2018, §§ 52-53.

<sup>25</sup> ECSR, *ERRC v Greece*, complaint No. 15/2003, decision on the merits of 8 December 2004, § 19; ECSR, *ERRC v Italy*, complaint No. 27/2004, decision on the merits of 7 December 2005, § 19.

<sup>26</sup> ECSR, *Autisme Europe v. France* (No. 13/2002), *cit.*, § 51.

<sup>27</sup> ECSR, *International Federation of Human Rights (FIDH) v. Ireland*, complaint No. 42/2007, decision on admissibility of 16 October 2007, § 11; ECSR, *Associação Sindical dos Profissionais da Polícia (ASPP/PSP) v. Portugal*, complaint No. 179/2019, decision on admissibility of 13 May 2020, § 6.

<sup>28</sup> ECSR, *S.AIGI - Syndicat des Hauts Fonctionnaires v. France*, Collective complaint No. 29/2005, decision on admissibility of 14 June 2005, § 7.

## B. GOVERNING VALUES (DIGNITY, EQUALITY, AUTONOMY, SOLIDARITY)

The common values that inspired the adoption of the Charter and that are governing principles of its interpretation are dignity, autonomy, equality and solidarity<sup>29</sup>.

### 1. Dignity

Human dignity is paramount among fundamental human rights values and, indeed, is at the heart of positive European human rights law “whether under the European Social Charter or under the European Convention of Human Rights”<sup>30</sup>. It is also a founding value of the EU<sup>31</sup>.

Under the Charter, the definitive role of dignity comes to the fore when protection is needed in situations of serious vulnerability or poverty, especially when the treatment of people in vulnerable situations amounts to discrimination, prevents social integration and leads to exclusion. Despite academic debates on the concept of “dignity” and its protection as a right<sup>32</sup>, the need for the protection of dignity is evident in situations such as minimal housing and eviction<sup>33</sup>, even if this requires the allocation of resources, but also when regulatory measures are needed for adequate treatment of persons with disability<sup>34</sup> or for the protection of health and physical integrity<sup>35</sup> or the protection of the elderly<sup>36</sup>.

### 2. Equality

Equality, which, together with dignity, is at the centre of universal human rights and a fundamental value, rose in significance with the adoption of the Revised Charter. This is not merely because of the addition of Article E (almost identical text with Article 14 of the ECHR) but rather results from the considerable changes to the approach to the value of equality, which motivated the re-drafting of Articles 8, 15 and 17 and the adoption of the new Articles 23, on the rights of the elderly, and 26, on dignity at the workplace. These provisions signal a shift from an assisting and caring paternalistic attitude to an approach based on equality, which preserves the dignity, autonomy and freedom of the individuals, a principle underlined by Bob Hepple in his critical analysis of the EU regulation on age discrimination<sup>37</sup>. The key decision *Autisme*

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<sup>29</sup> ECSR, *FIDH v. France*, *cit.*, § 27; ECSR, *DCI v. The Netherlands*, *cit.*, § 34; ECSR, *GSEE v. Greece*, complaint No. 111/2014, decision on the merits of 23 March 2017, § 45; ECSR, Conclusions XX-4, 2015, Statement of Interpretation - The rights of refugees under the Charter.

<sup>30</sup> ECSR, *FIDH v. France*, *cit.*, § 31.

<sup>31</sup> EU Treaty, Article 2 as referred by the 15 complaints submitted by the UWE against countries having ratified the Collective Complaint Protocol.

<sup>32</sup> Aharon BARAK, *Human Dignity, The Constitutional Value and the Constitutional Right*, Cambridge, CUP, 2015, WALDRON J. and DAN-COHEN M., *Dignity, Rank, and Rights*, Oxford, OUP, 2012.

<sup>33</sup> ECSR, *European Roma Rights Centre v. Italy*, complaint No. 27/2004, decision on the merits of 7 December 2005, § 54; ECSR, *European Roma Rights Centre v. Bulgaria*, complaint No. 31/2005, decision on the merits of 18 October 2006, § 52; ECSR, *FEANTSA v. France*, complaint No. 39/2006, decision on the merits of 5 December 2007, §§ 85, 106, 161; ECSR, *European Roma and Travellers Forum (ERTF) v. France*, complaint No. 119/2015, decision on the merits of 5 December 2017, § 68.

<sup>34</sup> ECSR, *Autisme Europe v. France*, *cit.*, §§ 48, 51.

<sup>35</sup> In the wake of ECSR, *FIDH v. France*, *cit.*, declaring (in § 31) that health care is a prerequisite for the preservation of human dignity; *cf.* ECSR, *International Planned Parenthood Federation - European Network (IPPF EN) v. Italy*, complaint No. 87/2012, decision on the merits of 22 October 2012, § 66; ECSR, *Transgender Europe and ILGA-Europe v. the Czech Republic*, complaint No. 117/2015, decision on the merits of 23 January 2018, §§ 82, 86.

<sup>36</sup> ECSR, *International Federation of Associations of the Elderly (FLAPA) v. France*, complaint No. 145/2017, decision on the merits of 22 May 2019, §§ 46, 48.

<sup>37</sup> “The starting point of all equality legislation is the right of individuals to autonomy, dignity and participation” (Bob HEPPLER, “Age as Discrimination in Employment” in Sandra FREDMAN and Sarah SPENCER (eds.), *Age as an Equality Issue: Legal and Policy Perspectives*. Hart Publishing, Oxford & Portland 2003, p. 79).

*Europe v. France* (complaint no. 13/2002) initiated this interpretive approach by emphasizing the positive obligations of governments to avoid indirect discrimination<sup>38</sup>.

### 3. Autonomy

Autonomy is mentioned immediately after dignity, confirming the close interrelationship between the two, corresponding with the dominant approach in the human rights literature<sup>39</sup> and signifying the importance of autonomy as a constituent element of dignity for the protection of social rights. Consequently, there is an overlap between cases and situations when the Committee's interpretation refers to both dignity and autonomy as underlying values of the protection of rights under the Charter. The first specific reference to autonomy came relatively late (in March 2013<sup>40</sup>), but it was implied (consciously or unconsciously) earlier in the form of reference to national and international documents or ECtHR precedents.

The rights of persons with disability prompted the first interpretation based directly on the value of autonomy. The decision in *European Action of the Disabled (AEH) v. France*<sup>41</sup> – on the violation of the right of children and young persons with autism to mainstream education and vocational training – cited the Explanatory Report to Article 15 of the Revised Charter, explaining the amendment by referring to the right of the people concerned, among others, to independence and autonomy. The significant obstacles preventing highly dependent adults with disabilities from accessing social welfare services appropriate to their needs were found to be in violation of their social rights under Article 13. The Committee explained the decision as partly due to the negative impact of such conditions on people's autonomy<sup>42</sup>.

Autonomy was also the focus of the case *Transgender Europe and ILGA-Europe v. the Czech Republic*<sup>43</sup> on the regulation prescribing medical intervention without the consent of the person, a clear violation of the right to health and physical integrity under Article 11, which is inseparably intertwined with the violation of dignity<sup>44</sup>. In other cases, the connection between the right to physical and mental health and dignity was established with implied reference to autonomy<sup>45</sup>.

### 4. Solidarity

Autonomy and solidarity, linked as “liberty” and “fraternity” during the French Revolution, seem today to sit “at the opposite ends of a list of human rights values”<sup>46</sup>. While liberty is seen as an element of civil and political freedom, solidarity appears to be a limitation of freedom and autonomy requiring the “haves” to share resources with the “have-nots”<sup>47</sup>.

Solidarity occupies a peculiar position in the case law of the ECSR. In earlier stages, it was mentioned mostly as the basic concept of social security rather than a technical term or a human rights principle.

The first mention of solidarity as a fundamental value in the context of individual human rights is found, together with equality and dignity, in the declarative list set out in the abovementioned case *FIDH v. France*

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<sup>38</sup> ECSR, *Autisme Europe v. France*, *cit.*, § 52.

<sup>39</sup> Cf. Aharon BARAK, *Human Dignity, The Constitutional Value and the Constitutional Right*, Cambridge, CUP, 2015 pp. 130, 145 (dignity as a relational concept).

<sup>40</sup> ECSR, *FIDH v. Belgium*, complaint No.75/2011, decision on the merits of 18 March 2013.

<sup>41</sup> ECSR, *European Action of the Disabled (AEH) v. France*, complaint No. 81/2012, decision on the merits of 11 September 2013, § 27.

<sup>42</sup> ECSR, *FIDH v. Belgium*, *cit.*, § 159.

<sup>43</sup> ECSR, *Transgender Europe and ILGA-Europe*, *cit.*

<sup>44</sup> *Ibid.*, § 82.

<sup>45</sup> Cf. ECSR, *European Roma Rights Centre (ERRC) v. Bulgaria*, complaint No. 151/2017, decision on the merits of 5 December 2018, § 27.

<sup>46</sup> Holly CULLEN, *cit.*, p. 71.

<sup>47</sup> The landmark quote from Charles A. REICH (“It is totally wrong to describe welfare as a transfer from the haves to the have-nots. The real transfer of wealth taking place in our society is from the have-nots to the haves” in “Due Process and the Fallacy of the “Rights Revolution”, in *Michigan Law and Policy Review*, 1996, p. 288).

(complaint no. 14/2003)<sup>48</sup>. The term was filled with meaning in the first decision on the housing rights of the Roma (*European Roma Rights Centre v. Greece*<sup>49</sup>). The Committee emphasized, in the spirit of VCLT 31(1), “that one of the underlying purposes of the social rights protected by the Charter is to express solidarity and promote social inclusion”, which requires respect of difference (housing habits here) and social arrangements to avoid a return to social exclusion<sup>50</sup>. This explanation of expected solidarity was repeated in *ERRC v. Italy*<sup>51</sup>. In the subsequent case law, it became a standard element of the method of interpretation in cases of extreme vulnerability and where measures were needed to avoid social exclusion<sup>52</sup>. The term in its traditional, more technical sense, is also used in the case law to refer to the classic idea behind and measure of compliance with the Charter in cases connected to social security<sup>53</sup>.

## C. A LIVING INSTRUMENT

The approach to the Charter as a “living instrument” also came from its interpretation as a human rights instrument and its proximity to the European Convention of Human Rights. Relying on the living instrument doctrine developed by the ECtHR<sup>54</sup>, the Committee acquired the necessary degree of flexibility to adjust its interpretation to the values that inspired the Charter and to extend the scope of its provisions as required by the purpose of the rights protected by the Charter.

The Committee referred to this principle for the first time in the cornerstone decision *FIDH v. France*<sup>55</sup> on the denial of entitlement to medical assistance to foreign nationals, in this case children, staying irregularly in the territory of the country. The circumstances of the particular case pointed sharply to the essential link between the interpretation and the purpose of the rule. The Committee emphasized that this restriction of personal scope “attaches to a wide variety of social rights (...) and impacts on them differently”. However, it also noted that in the case at hand, “it treads on a right of fundamental importance”, since it is “connected to the right to life itself and goes to the very dignity of the human being. Furthermore, in the given instance, the adverse impact of the restriction affected children exposed to the risk of no medical treatment”<sup>56</sup>. According to the Committee, this was contrary to the purpose of the Charter and infringed the fundamental rights laid down therein.

Thus, focusing on the protected values, the Committee developed a new interpretation of the text. It found that this restriction in the Appendix may apply only to the extent that it keeps “intact the essence of the right” in question and the achievement of the “overall purpose of the Charter”<sup>57</sup>. (The interpretation of permitted departures from or restrictions of Charter rights permitted under Article G of the Revised Charter follows the same line.)

This methodology of interpretation was repeated in later similar cases in which unlawfully present migrants, also children, were denied their rights enshrined in the Charter<sup>58</sup>. The Committee carefully analysed the difference between fundamental rights affecting life and dignity (e.g., the right to shelter) and other welfare

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<sup>48</sup> ECSR, *FIDH v. France*, *cit.*, § 20.

<sup>49</sup> ECSR, *ERRC v. Greece*, *cit.*

<sup>50</sup> *Ibid.*, § 19.

<sup>51</sup> ECSR, *ERRC v. Italy*, *cit.*, § 19.

<sup>52</sup> ECSR, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece*, complaint No. 49/2008, decision on the merits of 11 December 2009, § 37; ECSR, *European Roma Rights Centre (ERRC) v. Portugal*, complaint No. 61/2010, decision on the merits of 30 June 2011, § 18; ECSR, *FIDH v. Belgium*, *cit.*, § 26; ECSR, *European Roma Rights Centre (ERRC) v. Ireland*, complaint No. 100/2013, decision on the merits of 21 October 2013, § 54.

<sup>53</sup> E.g. ECSR, *Unione Italiana del Lavoro (U.I.L.) Scuola-Sicilia v. Italy* complaint No. 113/2014, decision on the merits of 24 January 2018, § 56; ECSR, *ECSR, Confédération Générale du Travail Forcé Ouvrière (FO) v. France*, complaint No. 118/2015, decision on the merits of 3 July 2018, § 72.

<sup>54</sup> First referred in ECtHR, 25 April 1978, *Tyrer v United Kingdom*, no. 5856/72, § 31. Cf. George LETSAS, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, OUP, 2009, p. 65; Kanstantsin DZEHTSIAROU, “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, *German Law Journal*, vol. 12, no.10, 2011, pp. 1731, 1745.

<sup>55</sup> ECSR, *FIDH v. France*, § 27.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, § 29.

<sup>58</sup> ECSR, *DCI v. the Netherlands*, *cit.*, §§ 34, 66; ECSR, *DCI v. Belgium*, *cit.*, §§ 52-53; ECSR, *EUROCEF v. France*, *cit.*, §§ 51-52.

rights (e.g., the right to adequate housing) to decide on the applicability of the restriction under Article 1 of the Appendix<sup>59</sup>. Hence the interpretation, considered first by some as *contra legem*, has become an accepted precedent<sup>60</sup>.

Besides the extension of the scope by the adjusted interpretation of the Appendix, the approach to the Charter as a “living instrument” led the Committee to innovative interpretations in other areas. The five collective complaints submitted by the World Organisation Against Torture (OMCT) against Italy, Portugal, Ireland, Greece and Belgium<sup>61</sup> led to an expanded interpretation of the social, legal and economic protection of children under Article 17 to cover the protection against corporal punishment. The interpretive method was similar, referring in part to the serious nature of the violation, to the living nature of the Charter, to the development of national laws and international instruments, and notably, to the case law of the ECtHR, specifically the 1978 *Tyrer case*, “which inaugurated the ‘living instrument’ approach”<sup>62</sup>.

The scope of Article 11 (right to protection of health) was re-interpreted and expanded to cover the right to a healthy environment in new areas. In the decision on *Marangopoulos Foundation v. Greece*<sup>63</sup>, the Committee took account of the growing link between the protection of health and a healthy environment, and – in line with the previously established methodology<sup>64</sup> – interpreted Article 11 “as including the right to healthy environment”<sup>65</sup>.

In *Transgender Europe and ILGA-Europe v. the Czech Republic*<sup>66</sup>, the Committee noted that the new issue raised by the complaint (gender reassignment surgery required for recognition of a change of gender identity) violated Article 11 of the Charter. The Committee gave a clear enumeration of the already crystallized elements of its approach to the Charter as a living instrument. It used the formerly elaborated interpretation technique to explain the widening of the scope of Article 11, emphasizing the importance of the affected fundamental values (autonomy, dignity), recalling the complementarity between the relevant articles of the Charter and the ECHR, and, as required by the living nature of the Charter, considering the emerging issues “in the light of current conditions” and “in the light of relevant international instruments”<sup>67</sup>.

The principle of dynamic interpretation of the Charter as a living instrument might have energized the “collective action” of University Women of Europe (UWE) that consisted of filing 15 collective complaints against all countries ratifying the Collective complaints Protocol claiming violations of Articles 1, 4 § 3, 20 and E of the Revised Charter and (by those not yet having ratified the Revised Charter) of Articles 1 and 4 § 3 of the 1961 Charter, as well as Article 1 of the 1988 Additional Protocol to the 1961 Charter in light of the non-discrimination clause of the Preamble to the 1961 Charter<sup>68</sup>. The situation that the series of complaints revealed “prompted the Committee to take a fresh look at the provisions of the Charter in the light of the current state of international and European law and practice in the area” and, in view of the “emerging new issues and situations”, to interpret the Charter “in a dynamic manner having regard to present day requirements”<sup>69</sup>.

While the Committee’s approach to the lack of measurable progress in respect of equal pay has been to continue to provide coherent interpretations of the requirements of progressive and dynamic provisions,

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<sup>59</sup> ECSR, *DCI v the Netherlands, cit.*, §§ 37, 44-48.

<sup>60</sup> It might be added that after the highly divided votes in the *FIDH v. France* case, the decisions finding violation in the three cases mentioned above were adopted unanimously.

<sup>61</sup> ECSR, *World Organisation Against Torture (OMCT) against Italy, Portugal, Ireland, Greece and Belgium*, complaints No. 17/2003-21/2003, decisions on the merits of 7 December 2004.

<sup>62</sup> ECtHR, *Tyrer v United Kingdom, cit.*; Georg LETSAS, *A Theory of Interpretation of the European Convention on Human Rights, cit.*, p. 61.

<sup>63</sup> ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, complaint No. 30/2005, decision on the merits of 6 December 2006.

<sup>64</sup> Linking the right to health to the right to life (ECHR, Article 2) as “complementary” (§ 202), refers to the Charter as “living instrument”, “therefore interprets [it] in the light of current conditions” (§ 194), “therefore” reference to the development: the growing link that Greece and international bodies make between the protection of health and a healthy environment (§ 195) to come to the novel conclusion.

<sup>65</sup> ECSR, *MFHR v. Greece, cit.*, § 195.

<sup>66</sup> ECSR, *Transgender Europe and ILGA-Europe, cit.*

<sup>67</sup> *Ibid.*, §§ 72, 73, 75.

<sup>68</sup> ECSR, *University Women of Europe (UWE) v. Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden*, complaints Nos. 124/2016 to 138/2016, decisions on the merits of 5 December 2019.

<sup>69</sup> Cf. ECSR: § 113 (*Belgium*), § 102 (*Bulgaria*), § 103 (*Croatia*), § 96 (*Cyprus*), § 98 (*Czech Republic*), § 110 (*Finland*), § 120 (*France*), § 99 (*Greece*), § 93 (*Ireland*), § 92 (*Italy*), § 99 (*the Netherlands*), § 88 (*Norway*), § 102 (*Portugal*), § 93 (*Slovenia*), § 103 (*Sweden*).

the requirement of “pay transparency” – which came to the attention of EU institutions in the first years of the 2000s – is a novel element of compliance with the relevant articles and is expected to become a permanent requirement in the future. The interpretation of the Charter as a living instrument also extended the scope of Article 20.d on the right to equal opportunities in “career development, including promotion” to include a balanced representation of women and men in decision-making positions within private companies.

### III. LIMITS OF THE COMMITTEE’S JURISDICTION

#### A. TEMPORAL ASPECTS

##### 1. Temporal aspects of the ECSR’s competence

Article 28 of the VCLT excludes the retroactive applicability of treaties: “Treaty provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

This rule gained significance in the collective complaints procedure. In the reporting procedure, the Committee adopts conclusions on the basis of the state of law and practice within the reporting period, which is currently four years. This system automatically excludes examination reaching back to the date of ratification or before.

In the case of collective complaints, the Committee’s jurisdiction under Article 28 VCLT starts on the date of the entry into force of the Collective complaint Protocol in the given country. With reference to the established legal interpretation of the Court and other international bodies, the Committee interprets its competence *ratione temporis* so that if the alleged acts or omissions took place prior to the date on which the Protocol entered into force for the given country, but the acts of breaching the obligation continue to have consequences and persistent effects even at the time when the complaint is lodged, it is irrelevant to speculate on the date when the violation first occurred and the Committee is competent to consider all the facts raised in the complaint and make a decision<sup>70</sup>.

##### 2. Temporal aspects of finding non-conformity

The interpretation practice of the Committee has established a difference between examining compliance under the reporting system and under the collective complaints mechanism.

In the reporting procedure, the Committee rules on the situation during the reference period covered by the report (which is four years under the current reporting system). When it finds non-conformity with a provision within the reference period but positive changes bring the situation into conformity outside the reference period (by the time of the adoption of the conclusion), the Committee generally maintains its finding of non-conformity<sup>71</sup>. In exceptional cases, the Committee extends the reference period to take into account changes that have taken place outside that period<sup>72</sup> or, if efforts to improve the situation during the reference period are evident, postpones its conclusion to the next reporting period<sup>73</sup>.

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<sup>70</sup> ECSR, *MFHR v. Greece, cit.*, decision on admissibility of 10 October 2005, § 9, and decision on the merits of 6 December 2006), § 193; ECSR, *COHRE v. Croatia*, complaint No. 52/2008, decision on the merits of 22 June 2010, §§ 18, 23.

<sup>71</sup> ECSR, Conclusions XV-1 (2000), Article 1 § 2, Denmark; ECSR, Conclusions XIX-3 (2010), Article 6 § 2, The Former Yugoslav Republic of Macedonia.

<sup>72</sup> ECSR, Conclusions VI (1982), Article 3 § 1, Iceland.

<sup>73</sup> ECSR, Conclusions XV-2 (2001), Article 11, France.

Regarding the collective complaints procedure, the Committee rules on the situation as it exists on the day of its decision on the merits<sup>74</sup>. In the case *MDAC v Belgium*<sup>75</sup>, this made it possible to take into consideration General Comment no. 4 on The Right to Inclusive Education of the UN Committee on the Rights of Persons with Disabilities. The General Comment was adopted in September 2016 during the process of evaluating the submissions of the parties.

## B. MATERIAL AND PERSONAL SCOPE

The scope of the various Charter rights is examined in the relevant chapters in this volume. This subsection gives a brief general overview of the most important general elements of the method of interpretation.

The Committee has the task of determining the scope of each right, which it does based on the protected values and the underlying objectives. Furthermore, as part of the task of interpreting the Charter as a living instrument, it also takes into consideration contemporary standards and interests, leading to the extension of the content of several articles<sup>76</sup>. The Committee follows gradation in cases of extension of obligations and concludes on such cases after collecting as much information as possible on the issue. The clarification of obligations under overlapping provisions is a significant task that requires a complex and nuanced method of interpretation. Article A of the Charter (Article 19 of the 1961 Charter) provides for an “a la carte” acceptance of provisions, taking into consideration the historical, political and economic differences between the States Parties. This selective form of ratification can result in tension when there are overlaps between the material scope of certain provisions if a country has not ratified each of the overlapping articles. It is the task of the Committee to arrive at an interpretation “to ensure at the same time that obligations are not imposed on States Parties 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.”<sup>77</sup>

The personal scope of the Charter was briefly touched upon above as an issue relating to the principles (the teleological and evolutive nature) of interpretation and will be discussed in a separate chapter<sup>78</sup>. The personal scope of articles that do not cover “everyone” but rather specific groups requires a method of outlining the personal coverage corresponding to the general principles of interpretation.

When the need arises to define the concept (e.g., “workers” as right holders in different contexts, “employed women” with regard to maternity protection under Article 8, “family” as having the right to social, legal and economic protection), the Committee provides an explanation starting from the purpose and objective of the article in question. It usually gives a broad definition so that the protection covers everyone who may need it and examines any limitation or narrowing of the concept by the States Parties under the requirements of Article G.

The broad interpretation results in the general inclusion of self-employed workers in the concept of “workers” in the provisions using the term, in spite of the silence of the Charter on this concept. While there is some difference between individual and collective rights under the Charter, the purposive method of interpretation results in a broad coverage (exceeding the concept of employed workers) of persons entitled under Articles 5 and 6. Some provisions might have specific and narrower boundaries regarding the concept of “workers” (e.g., Articles 21, 22, 24 or 28). These provisions, in the context of which the term “workers” covers a specific group, call attention to the closely intertwined nature of the personal and material scope of the Charter’s provisions. This is also the case with provisions covering groups such as

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<sup>74</sup> ECSR, *European Council of Police Trade Unions (CESP) v. Portugal*, complaint No. 11/2001, decision on the merits of 21 May 2001; ECSR, *FEANTSA v. France*, *cit.*, § 51; ECSR, *European Council of Police Trade Unions (CESP), v. France*, complaint No. 57/2009, decision on the merits of 1 December 2010, § 52.

<sup>75</sup> ECSR, *MDAC v Belgium*, complaint No. 109/2014, decision on the merits of 16 October 2017, § 24.

<sup>76</sup> Article 11 as it was seen above, Article 7 § 10 extended to corporal punishment, Article 16 extended to fundamental housing rights, to domestic violence etc.

<sup>77</sup> ECSR, *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, Complaint No. 41/2007, decision on admissibility, 26 June 2007, § 9.

<sup>78</sup> Aristea KOUKIADAKI, vol. 7. Part V (Art E, F, G, H, I, J), Part VI (Art K, L, M, N, O) and introduction of the Appendix (Scope of the ESC in terms of persons protected).

“children and young persons”, “disabled persons”, “elderly persons” and “persons with family responsibilities”.

## IV. PROCESS AND SOURCES OF INTERPRETATION

The general principles of interpretation are laid down in VCLT 31, which sets out practical methods, sources to be used and the process to be followed. For this process, “the general rule in article 31 is conceptually clear: progression from terms to context, through any agreements at the time of conclusion of a treaty, to subsequent agreements, subsequent practice, and thence to relevant rules of international law”<sup>79</sup>.

### A. PROCESS AND HISTORY

In this process of moving from terms to context, the ECSR unfolds the concrete rights and obligations under specific articles, relying first on the text and connected documents (the Preamble and the Appendix, as well as the *travaux préparatoires*) and later on its own case law. It also makes wide use of “relevant international law” (primarily the ECHR). The consistent observance of the fundamental principles laid down in VCLT 31, in the case of the Charter, is necessarily coupled with a method that takes into account the variety of economic and social backgrounds in the ratifying countries. This double task resulted in the gradual but dynamic development of the methods and standards of compliance.

The history of ECSR’s interpretive activity demonstrates that the Committee took care to define terms and concepts essential for the exercise of certain rights from the outset. This took the form of “Statements of interpretation”, which rely partly on the “ordinary meaning” of terms and also on the collection of information and data to gradually finding a common required standard, so that standard-setting contributes to the meaning of the term.

This process shows continuity and also stages. Conclusions I of the first supervision cycle of the 1961 Charter (in 1969) and Conclusions 2002 (the first supervision cycle following the entry into force of the Revised Charter) can be considered two major “openings” of interpretation phases, both containing a larger number of interpretive statements compared to other cycles. The Collective complaint Protocol has brought essential changes, not only in the content of terms and concepts but also, and perhaps more importantly, in the sources used and the procedure for interpretation, which entails increased communication with governments and non-governmental organizations and a wider reliance on international instruments.

Some examples from Cycle I onwards clearly illustrate the “gradual” and “dynamic” development of the interpretation of key concepts of the provisions. This shaping results from the growing body of information obtained by the Committee and the progressive construction of common required standards always based on the purpose and principles of the provisions.

One example, from Article 8 § 1 is the term “adequate benefit”, which must be paid for the period of maternity leave. It was circumscribed but not defined in Cycle I (based on the assessment of four country reports). Later, on the basis of reports, 70% of the salary was suggested as an “example” of “adequate”<sup>80</sup>. At the end of the gradual process (based on the increased supply of information), the Committee set a rule that even if the State Parties may choose between modalities, “these shall ... not be less than 70% of the previous wage”<sup>81</sup>.

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<sup>79</sup> Richard K. GARDINER, *Treaty Interpretation*, Oxford, OUP, 2016, 2<sup>nd</sup> edition, p. 290.

<sup>80</sup> ECSR, Conclusions XVII-2, Latvia, Article 8 § 1.

<sup>81</sup> ECSR, Conclusions 2015 - Statement of interpretation - Article 8 § 1.

A gradual but more dynamic development can be observed regarding the meaning of the term “free choice” in Article 1 § 2 on the right to earn one’s living in an occupation freely entered into. The original two categories of violation – discrimination and forced labour<sup>82</sup> – were supplemented with another examination category, titled “other aspects of the right to earn one’s living in an occupation freely entered upon”<sup>83</sup>. This interpretive progress was promoted by collective complaints (e.g., mandatory civilian service of conscientious objectors did not qualify as “forced labour” but violated the freedom guaranteed under Article 1 § 2 by its disproportionate length<sup>84</sup>), the impetus of interpretational developments under the Revised Charter and national reports on recurrent clarifying questions regarding the criteria for unemployed persons not to lose unemployment benefit<sup>85</sup>.

In the 2002 Conclusions, the Committee decided for the first time to apply the Revised Charter to the states that had ratified it. It was considered necessary to provide guidance on the interpretation of the changed provisions and the differences between the “old” and the Revised Charter. The “statement of interpretation – general matters” declared that the Committee would “progressively determine its interpretation of the amended provisions and the new provisions”, while the interpretation of the provisions that had not been amended would remain valid. Future changes in the interpretation of these provisions would naturally apply to both treaties. On this occasion, the Committee summarized developments in the case law, foreseeing future interpretative changes – demonstrating many of its interpretation techniques.

## B. SOURCES OF INTERPRETATION

“Text” and “context” are the two elements given by Article 31(2) of VCLT as the guidance on the method of interpretation to be followed. The context is determined, at the first stage, by the textual “environment” – preamble, annexes – of the provision within the treaty itself. In the case of the Charter, this means a method that takes into consideration Part I, the Preamble, the Appendix, the *travaux préparatoires* and, last but not least, the precedents of the Committee itself as the “closest” sources of interpretation. At the same time, the VCLT requires that the “context” must also involve the international “environment”, that is, agreements or treaties between the parties or accepted by the parties.

### 1. Charter-related sources

The Committee recurrently uses reference to Part I to identify a goal to be achieved under Part II<sup>86</sup>. The references to the text of the paragraph concerned serve as an orientation regarding standards to be observed under Part II. They not only seem to add legal meaning to the enumeration of the 19 or 31 “rights and principles” but underscore their nature as human rights permitting any restriction under strictly regulated and narrowly interpreted conditions. Not surprisingly, Part I is quoted primarily in connection with the interpretation of permitted restrictions of the rights enumerated there, and the reference generally contributes to a conclusion that the restrictions imposed by a government go beyond what is permitted by the Charter. To be more specific, Paragraph 6 of Part I, on the right to bargain collectively, is the most quoted principle of the Preamble, emphasizing in the references to this Paragraph that this right has been granted to “all workers and employers” whenever restrictions limit this right of organized workers<sup>87</sup>.

Similarly, the reference to the text of paragraph 18 in Part I (the equal right “to engage in any gainful occupation [in the territory of the others] subject to restrictions based on cogent economic or social

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<sup>82</sup> ECSR, Conclusions I – Statement on interpretation on Article 1 § 2.

<sup>83</sup> ECSR, Conclusions 2002 – Interpretative Statement on Article 1 § 2.

<sup>84</sup> ECSR, *Quaker Council for European Affairs (QCEA) v Greece*, complaint No. 8/2000, decision of 12 December 2002, § 23.

<sup>85</sup> E.g. ECSR, Conclusions XV-1, Luxembourg, Norway - Article 1 § 2; Conclusions 2002, Slovenia - Article 1 § 2.

<sup>86</sup> Article A: Part I is “a declaration of the aims”.

<sup>87</sup> ECSR, Conclusions IV, Germany - Article 6 § 4; Conclusions X-1, Norway, p. 76; Conclusions XIII-1, the Netherlands - Article 6 § 4; Conclusions XVI-1 Sweden, Article 6 § 4.

reasons”) is used to underline the spirit of liberalization expected of states and the strong justification required for restrictions of this right.

The Preambles to the 1961 and the Revised Charter are conspicuously different in terms of their interpretative use. The Preamble of the 1961 Social Charter, namely its non-discrimination clause, is routinely cited in decisions and conclusions where there is a question of equal treatment under a provision (such as Article 1, 4, 11, 12 and 16) in countries that have not yet ratified the Revised Charter. By contrast, the Preamble of the Revised Charter – in spite of the apparently principal and meaningful statements of the recitals – is not referred to in the case law, with one exception. In *COHRE v. Italy* (complaint no. 58/2009), the Committee placed emphasis on “the principle of progressiveness which is explicitly established in the Preamble”, which guides the realization of the Revised Charter<sup>88</sup>. In this case, the serious lack of progressiveness and the attitude of authorities (who had not only been idle in preventing but, in some cases, had even contributed to serious violations) led the Committee to include the concept of “aggravated violation” in its decision<sup>89</sup>. This term was used, as precedent in later cases, to indicate consequences (appropriate assurances and guarantees of non-repetition) beyond adequate measures of reparation<sup>90</sup>.

The Appendix forms an integral part of the Charter<sup>91</sup> and takes central place in the interpretative methodology of the Committee. Its principal role in the interpretation relates primarily to the widened personal scope (covering irregular migrants) on the basis of the purpose and objective of the Charter, as presented in subsection II.C above.

This extension confronted the Committee with another interpretive task: to differentiate between rights with regard to the applicability of the exception from the Appendix.

By establishing the exception from the rule on personal scope, the Committee emphasized that Appendix § 1 applies to the “wide variety” of Charter rights and impacts on them differently<sup>92</sup>. Therefore, it has drawn a line between situations when excluding irregular migrants “from the protection afforded by the Charter would have seriously detrimental consequences for their fundamental rights” and situations where the exclusion does not have such an impact. Whether a situation belongs to the first or the second category is extremely complex to distinguish and needs to be assessed on a case-by-case basis<sup>93</sup>. Beyond its inclusive approach to the exposure of children to excessively vulnerable situations, the Committee considered that the provision of the necessary food, water, shelter and clothing to adult migrants in an irregular situation is also linked to the most fundamental rights of these persons, as well as to their human dignity<sup>94</sup>.

The required case-by-case analysis led to different conclusions. In *Médecins du Monde v France* (no. 67/2011), the Committee – distinguishing between the right to housing (31 § 1), and the right to shelter (31 § 2) – found that the facts of the evictions in the case and the deprivation from shelter affected “rights linked to life and dignity” and, therefore, declared that the protection applies to all migrants irrespective of their legal status<sup>95</sup>. In the same case, the Committee decided that the right to family benefits under Article 16 is not applicable to undocumented residents<sup>96</sup>.

The use of *travaux préparatoires* as sources of interpretation has a limited and decreasing role in the set of interpretative methods applied by the Committee. Apart from initial interpretative statements and references in earlier conclusions (mostly on Article 5), the case law indicates a reserved attitude to citing the intention of the drafters. This approach is not contrary to general tendencies in the world of international treaties: “Under Article 31, paragraph 2, of the Vienna Convention, *travaux préparatoires* do not even qualify as part of a treaty’s context; clearly, the Vienna Convention envisages but a very limited role for a treaty’s preparatory works with special regard to a single treaty. One can imagine that the role of preparatory works

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<sup>88</sup> ECSR, *COHRE v. Italy*, complaint no. 58/2009, decision on the merits of 25 June 2010, § 27.

<sup>89</sup> *Ibid.*, § 76.

<sup>90</sup> ECSR, *COHRE v. France*, complaint No. 63/2010, §§ 53, 54; ECSR, *ERTF v. France*, complaint No. 64/2011, § 131.

<sup>91</sup> Article N (Article 31 of the 1961 Charter).

<sup>92</sup> ECSR, *FIDH v. France, cit.*, § 30.

<sup>93</sup> ECSR, *DCI v. the Netherlands, cit.*, §§ 37-38; ECSR, *CEC v. the Netherlands*, complaint No. 90/2013, decision on the merits of 1 July 2014, §§ 70-71.

<sup>94</sup> ECSR, *CEC v. the Netherlands, cit.*, § 74.

<sup>95</sup> ECSR, *Médecins du Monde v France*, complaint No. 67/2011, decision on the merits of 11 September 2012, §§ 34, 76.

<sup>96</sup> *Ibid.*, § 99.

diminishes the older the treaty gets: this makes intuitive sense.”<sup>97</sup> The exceptional status of Article 5 in this context is not surprising in light of the principal role of the International Labour Organisation (ILO) and its standards in the birth of the 1961 Charter and its revision to form the Revised Charter<sup>98</sup>. The reference, thus, establishes a link to the relevant ILO standards on the positive and negative aspects of the freedom of association and the permissible limitations of the right to organize in the police and armed forces (referred to directly under the subtitle “Relevant International Materials” in the decisions on collective complaints about limitations on freedom of association).

In the first two decades of its quasi-judicial activity under the collective complaints system, the Committee has built up a considerable body of decisions. From the beginning, it has used these decisions, especially those of principal significance in the interpretation of subsequent complaints, as sources of interpretation. The first foundational decisions – *ICJ v. Portugal* (1/1988), *Autisme Europe v. France* (13/2002) and *FIDH v. France* (14/2003) – have become key precedents. The Committee uses them as permanent carriers of the main principles evolving them from their inception state in the early decisions to powerful pillars of interpretation. The Committee has continuously drawn on such precedents in later cases, either repeating and confirming or, in some cases, further developing the initial concepts and thoughts. It uses these as precedents in its interpretation of subsequent complaints.

The principles developed through the collective complaints procedure are reiterated in the reporting system, in the form of statements of interpretation (e.g., on the rights of refugees, trade union freedoms, or the right to family protection), most of them in the wake of developments in the case law through collective complaints. A similar progressive practice of the Committee is to create “waves” of examination of formerly unquestioned aspects of compliance with certain provisions in the wake of collective complaints. One example is the question put to all countries on the earlier unexamined question of the legislative prohibition of corporal punishment after the adoption of decisions finding several countries in violation of Article 7 § 10, and Article 17. Through such targeted examinations, the Committee creates a “spill-over” effect of collective complaints, extending their effect to all countries that have ratified the articles on the subject matter of the given case.

## 2. International and European sources

The Charter, as an international treaty, has to be interpreted according to VCLT 31(3)(c), within the framework of relevant international treaties. The range of such international instruments is defined, again, by the purpose and objective of the treaty<sup>99</sup>. Correspondingly, relevant international treaties and other documents adopted to save human rights, solidarity and dignity are primary sources for interpretation of the Charter. International treaties on the same subject are concluded at different levels (global, regional and sub-regional). Besides conducting careful contextual analysis, the Committee interprets these international treaties by taking into consideration the interpretation given to these treaties by their respective monitoring bodies, although there is no hierarchy either between the treaties or bodies at different levels. Still, the lower standards of the global level treaties have to be observed as a mandatory minimum level. This lowest common denominator approach must not prevent upward departure through the text and interpretation of the regional treaties.

### a. Sources at UN (global) level

At the global UN level, the ILO and its treaties have a distinct and close relationship with the Charter<sup>100</sup>, particularly with regard to its standards concerning working life. It played a significant role in the

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<sup>97</sup> Jan KLABBERS, “International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?”, *Netherlands International Law Review*, vol. 3, 2003, p. 268.

<sup>98</sup> Francois VANDAMME, “The Revision of the European Social Charter”, *International Labour Review*, vol. 133, nos. 5-6, 1994, p.635.

<sup>99</sup> Cf. VCLT, *cit.*, article 31(1).

<sup>100</sup> Cf. Kari TAPIOLA, “European and global standards and their interaction” in *Reform of the European Social Charter, cit.*, p. 23.

preparation of both the 1961 and the 1996 texts of the Charter,<sup>101</sup> as well as the Collective complaint Protocol. The consultative participation of an ILO representative in the deliberations of the ECSR confirms the significance of its role in the protection of the fundamental rights concerned. Frequent references to the most important Conventions (on collective rights, non-discrimination and health protection) are found in the considerations. However, it seems that the ECtHR's interpretation and decisions might be an efficient vehicle for the more active, substantive role of ILO standards in the Committee's decisions. For example, the position of the ECSR on the interpretation of Article 5 (second sentence) permitting a total ban on the right to organize of armed force members changed following the ECtHR judgements *ADEFDROMIL v. France* and *Matelly v. France*<sup>102</sup>.

Outside the area of working life, UN treaties play a central role in the interpretation of the Charter provisions regarding housing, health and the rights of children and persons with disability. The most relevant UN treaty for the interpretation of the Charter is the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ECSR consistently refers to the interpretative General Comments issued by the UN Committee on Economic, Social and Cultural Rights (CESCR) in its decisions. Corresponding to the frequency of cases on adequate and forced evictions addressed in General Comments no. 4 and 7 interpreting Article 11 of the ICESCR (on the right of everyone to an adequate standard of living), and General Comment no. 14 on the highest attainable health (ICESCR, Article 12), the CESCR's interpretative statements are important sources, providing important guidance for the broader content and components of terms such as "health", "availability" and "accessibility".

The UN Convention on the Rights of the Child (CRC) has proved particularly beneficial for progress in the interpretation of Article 7 of the Charter and for developing the effective prohibition of corporal punishment and shows the attitude of the Committee to progress in international law. Corporal punishment was on the agenda from the early years of the collective complaints procedure, with divergent views and results<sup>103</sup>, while the interpretation in General Comment nos. 8 and 13 (adopted in 2006 and 2011) clarifying the disputed term of "violence" resulted in strong unanimous decisions of the ECSR<sup>104</sup>. The UN Convention on the Rights of Persons with Disabilities (CRPD), a relative latecomer to the family of UN human rights treaties,<sup>105</sup> has a strong relationship with the radically re-worded Article 15 of the Revised Charter: both are based on the up-to-date non-discriminatory concept of the rights of persons with disabilities, guaranteeing equal treatment at work, reasonable accommodation, equal chances and social inclusion instead of protection and assistance. Thus, the CRPD, particularly its General Comment no. 4 on the right to inclusive education, was quoted without delay<sup>106</sup> by the ECSR as a confirmation of its former approach.

Gender and racial equality are highly valued and of great importance in the case law. However, the ECSR relies more frequently for its interpretation on the case law of the ECtHR and on European Union law than on related UN instruments, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The radical change came with the "collective action" of the fifteen UWE collective complaints submitted in 2016 against the violation of equal treatment of women in employment. A greater variety of global or lower-level instruments are enriching the set of interpretative sources used by the Committee, including the 1951 UN Convention on the Status of Refugees, which requires special mention due to its growing relevance<sup>107</sup>.

## b. Sources at European level

The close relationship between the Charter and the ECHR, the indivisibility of human rights (recognized by the 1993 Vienna Declaration) and their complementary role established a close relationship between

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<sup>101</sup> Francois VANDAMME, *cit.*

<sup>102</sup> ECSR, *CGIL v. Italy*, complaint No. 140/2016, decision on the merits of 22 January 2019; *cf.* Klaus LÖRCHER, "Interpretatio" in S. CLAUWAERT, K. LÖRCHER, I. SCHOEMANN (eds), *The European Social Charter and Employment Relations*, Oxford, Hart, 2016, p. 52, also footnote 54.

<sup>103</sup> *Cf.* the decisions and the concurring and dissenting opinions on the series of collective complaints submitted by the World Organisation Against Torture (OMCT) in 2003.

<sup>104</sup> *Cf.* decisions on the merits of collective complaints Nos 92-95, 96-98/2013.

<sup>105</sup> It was adopted in December 2006 and came into force in May 2008.

<sup>106</sup> It was published in September 2016 and cited already in ECSR, *MDAC v. Belgium*, *cit.*

<sup>107</sup> ECSR, Conclusions XX-4 (2015), Statement of Interpretation - The rights of refugees under the Charter.

them, which gradually became mutual. The settled interpretation principles of the elaborate case law of the ECtHR serve as a source of interpretation for the ECSR when defining the meaning of related terms and concepts. In a number of areas, including freedom of association and collective action (Article 11 of the ECHR and Article 5, 6 of the Charter), free choice of work (the prohibition of slavery and forced labour), the right to privacy under Article 1 § 2, the right to protection from inhuman or degrading treatment of children or in employment, the content of rights has been developed through a mutual interpretative process.

This relationship between the Charter and the Convention (i.e., the two human rights treaties of Europe) is fundamentally different from that between the Charter and the law of the European Union. They belong to different spheres of the European Community's legal system. While the Charter establishes the social constitution of Europe, the Treaties of the European (Economic) Community, later European Union, were created to serve as the economic constitution of the Community. As a consequence, obligations under EU law and those under the Charter do not necessarily correspond to each other. The Committee has clearly stated that while under certain circumstances there might be a presumption of conformity of European Union law with the European Convention on Human Rights<sup>108</sup>, no similar presumption – even rebuttable – may be applied with regard to the European Social Charter.

Thus, the Committee has repeatedly stated that it is neither competent to assess the conformity of national situations with a directive of the European Union nor to assess the compliance of a directive with the European Social Charter. Member States should take full account of their obligations when the transposition of an EU directive into domestic law may affect the proper implementation of the Charter. The fact that a provision complies with a directive does not remove it from the ambit of the Charter, and it is ultimately for the Committee to assess compliance of a national situation with the Charter<sup>109</sup>.

## CONCLUDING REMARKS

The more than fifty years of active operation of the European Social Charter and the process of its interpretation since the first supervision cycle in May 1969 may be described as a multi-layered process of approximation.

Firstly, there is an approximation between civil-political rights and social-economic rights. This is, in part, an internal element, with special regard to the significant progress brought by the Revised Charter. However, this approximation is also an essential external element of the world of international human rights treaties, manifested in the increasingly closer and increasingly reciprocal relationship between the European Social Charter and the European Convention of Human Rights.

Secondly, one notices an approximation between so-called negative and positive rights, resulting in the blurring of the boundaries between these categories of rights, under both the Convention and the Charter systems. The increasingly obvious need for positive measures and state actions to protect fundamental freedoms, or “negative rights”, confirms the approximation between formerly artificially distinguished rights, as well as between the two treaties.

Thirdly, an approximation between progressive obligations of conduct and obligations of result is to be mentioned. Apparently vague, programmatic rights and obligations have gradually been interpreted in terms of clear and accountable targets. This has been achieved through restructured reporting-requirements, data collection, systematic analysis of information and data, the application of a system of indicators and thresholds making compliance and progress of the Contracting Parties comparable and measurable.

Last but not least, the approximation between the individual and the collective has played a role. In the past, these two were seen as opposites. Collective and individual interests and rights were seen as an intrusion into or an infringement of each other, depending on the ideological perspective from which they

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<sup>108</sup> ECtHR, [GC] 30 June 2005, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, no 45036/98, § 156.

<sup>109</sup> ECSR, *Confédération générale du travail (CGT) v. France*, complaint No.55/2009, decision on the merits of 23 June 2010, §§ 32-35, ECSR, *LO and TCO v. Sweden*, complaint No. 85/2012, decision on the merits of 3 July 2013, §§ 72-73.

were viewed in the pre-1990 divided world. Now, by contrast, a vision of synergy and long-term mutually beneficial impact is gaining support. This shift is also connected to the increasing similarity between the Convention, which is a treaty on individual human rights, and the Charter, which was adopted to protect rights in a collective and social sense. The technical interpretational rule that individual complaints are just illustrations of a collective problem may add deeper meaning to social wisdom regarding the interdependence between society and its individual members.

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