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Contribution of the Council of Europe

Freedom of association as guaranteed by the European Social Charter

Freedom of association finds its expression in the European Social Charter¹ and the revised Social Charter, as the right to organise. Article 5 of the Charter (and revised Charter) reads as follows:

"With a view to ensuring or promoting the freedom of workers and employers to form, local, national or international organisations for the protection of their economic and social interests and to join those organisation, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws and regulations".

Article 5 has given rise to an extensive case law established during its supervision by the European Committee of Social Rights, ("the Committee").² This provides a valuable insight into the nature and scope of the Article.

¹ The European Social Charter (hereinafter referred to as "the Charter") sets out rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by States Parties. It was recently revised, and the 1996 Revised European Social Charter, which came into force in 1999, is gradually replacing the initial 1961 treaty. 35 States have ratified either the Charter or the Revised Charter. Three Protocols have been added to the initial 1961 treaty: Protocol No. 1 (1998) which adds new rights – Protocol No. 2 (1991) which reforms the procedure of control regarding reports – Protocol No. 3 (1995) which provides for a procedure of collective complaints.

² The European Committee of Social Rights (referred to below as "the Committee") ascertains whether countries have honoured the undertakings set out in the Charter. Its thirteen independent, impartial members are elected by the Council of Europe Committee of Ministers for a period of six years, renewable once. The Committee determines whether or not national law and practice in the States Parties are in conformity with the Charter.

► A monitoring procedure based on national reports: Every year the states parties submit a report indicating how they implement the Charter in law and in practice. Each report concerns some of the accepted provisions of the Charter. The Committee examines the reports and decides whether or not the situations in the countries concerned are in conformity with the Charter. Its decisions, known as "conclusions", are published every year.

► A collective complaints procedure: Under a protocol opened for signature in 1995, which came into force in 1998, complaints of violations of the Charter may be lodged with the European Committee of Social Rights.

The right of workers and employers to organise entails:

1. Forming trade unions and employer associations

Trade unions and employer organisations must be free to organise without prior authorisation, and initial formalities such as declaration and registration must be simple and easy to apply.

If fees are charged for the registration or establishment of an organisation, they must be reasonable and designed only to cover strictly necessary administrative costs.³

Requirements as to minimum numbers of members comply with Article 5 if the number is reasonable and presents no obstacle to the founding of organisations.⁴

Trade unions and employers' organisations must be independent where anything to do with their organisation or functioning is concerned. The following examples constitute infringements in breach of Article 5: prohibiting the election of or appointment of foreign trade union representatives, substantially limiting the use that a trade union can make of its assets and substantially limiting the reasons for which a trade union is entitled to take disciplinary action against its members.

Trade unions must be free to form federations and join similar national and international organisations⁵ and so States party may not limit the degree to which they are authorised to organise.

There must also be provision in domestic law for a right of appeal to the courts to ensure that all these rights are upheld.

2. Right to join or not to join a trade union

Workers must be free not only to join but also not to join a trade union.⁶

Domestic law must guarantee the right of workers to join a trade union and include effective punishments and remedies where this right is not respected. Trade union members must be protected from any harmful consequence that their trade union membership or activities may have on their employment, particularly any form of reprisal or discrimination in the areas of recruitment, dismissal or promotion because they belong to a trade union or engage in trade union activities. Where such discrimination occurs, domestic law must make provision for compensation that is adequate and proportionate to the harm suffered by the victim⁷.

³ Conclusions XV-1, United Kingdom, p. 628 and Conclusions XVI-1, United Kingdom, p. 683.

⁴ Conclusions XIII-5, Portugal, p. 172

⁵ Conclusions I, p. 31

⁶ Conclusions I, Statement of Interpretation on Article 5, p. 31

⁷ Conclusions 2004, Bulgaria, p. 32

Furthermore, no worker may be forced to join or remain a member of a trade union. Any form of legally compulsory trade unionism is incompatible with Article 5⁸. The freedom guaranteed by Article 5 is the result of a choice and such decisions must not be taken under the influence of constraints that rule out the exercise of this freedom⁹. To secure this freedom, domestic law must clearly prohibit all pre-entry or post-entry closed shop clauses and all other union security clauses (e.g. automatic deductions from the wages of all workers, whether union members or not, to finance the trade union acting within the company)¹⁰. Consequently, clauses in collective agreements or legally authorised arrangements whereby jobs are reserved in practice for members of a specific trade union are in breach of the freedom guaranteed by Article 5¹¹.

The same rules apply to employers' freedom to organise.

3. The right of organisations to protect the economic and social interests of its members

i. The primary means of doing so is through collective bargaining. Thus, undue restriction of or interference in collective bargaining (contrary to Article 6§2) is also not in conformity with Article 5.

The recognition of one or more trade unions as privileged partners in the collective bargaining process is not as such contrary to Article 5. However

- such recognition should be based on objective, pre-established criteria and subject to suspension and regular review by an independent body, and
- other trade unions should enjoy the essential trade union prerogatives.

ii. Trade unions and employers' organisations must be largely independent where anything to do with their infrastructure or functioning is concerned. They are entitled to perform their activities effectively and devise a work programme¹². Consequently, any excessive state interference constitutes a violation of Article 5.

This independence takes various forms:

- a) Trade unions are entitled to choose their own members and representatives.
- b) Excessive limits on the reasons for which a trade union may take disciplinary action against a member constitute an unwarranted incursion into the autonomy of trade unions inherent in Article 5¹³.
- c) Trade union leaders must have access to the workplace and union members must be able to hold meetings at work in so far as employers' interests and company requirements permit¹⁴.

⁸ Conclusions III, p. 30

⁹ *Confederation of Swedish Enterprise v. Sweden*, complaint no. 12/2002, decision on the merits of 15 May 2003, § 29

¹⁰ Conclusions VIII, Statement of Interpretation on Article 5, p. 77

¹¹ Conclusions XV-1, Denmark, p. 142

¹² Conclusions XII-2, Germany, p. 98

¹³ Conclusions XVII-1, United Kingdom, p. 510

¹⁴ Conclusions XV-1, France, p. 240

4. Personal scope

General scope

- a) Article 5 applies both to the public and to the private sector¹⁵.
- b) Only *nationals* of other States party residing or working legally on the territory of the contracting party concerned may enjoy the rights guaranteed by the Charter. Under Article 19§4b of the Charter, States party must secure for nationals of other Contracting Parties treatment not less favourable than that of their own nationals in respect of membership of trade unions and enjoyment of the benefits of collective bargaining.

Restrictions

- a) Exception with regard to the armed forces

Definition of armed forces

With regard to the armed forces, Article 5 states as follows: “*The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations*”. The states party are entitled to restrict or withdraw the right of the armed forces to organise¹⁶. The Committee must check, however, that bodies defined in national law as belonging to the armed forces do indeed perform military functions¹⁷. With regard to *gendarmes*, the Committee has found that they can be equated with military personnel in the light of their duties and therefore they are excluded from the right to organise.¹⁸

- b) Restriction with regard to the police

Types of restriction allowed

With regard to the police, the Committee has found that “*it is clear, in fact, from the second sentence of Article 5 and from the ‘travaux préparatoires’ on this clause, that while a state may be permitted to limit the freedom of organisation of the members of the police, it is not justified in depriving them of all the guarantees provided for in the article*”¹⁹. In other words, police officers must enjoy the main trade union rights, which are the right to negotiate their salaries and working conditions, and freedom of association²⁰. Compulsory membership of organisations also constitutes a breach of Article 5²¹.

- c) Other restrictions

¹⁵ Conclusions I, Statement of Interpretation on Article 5, p. 31

¹⁶ *European Federation of Employees in Public Services v. France, Italy and Portugal*, complaints no. 2/1999, no. 4/1999, no. 5/1999, decision on the merits of 4 December 2000.

¹⁷ Conclusions XVIII-1, Poland, p.

¹⁸ Conclusions XVIII-1, France, p.

¹⁹ Conclusions I, Statement of Interpretation on Article 5, p. 31

²⁰ *European Council of Police Trade Unions v. Portugal*, complaint no. 11/2001, decision on the merits of 22 May 2002.

²¹ Conclusions I, Statement of Interpretation on Article 5, p. 31

Under Article G of the revised Charter restrictions must be *“prescribed by law and ... necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals”*.

Further information on the right to organise and the European Social Charter can be obtained from the following publications:

- The European Social Charter - Collected texts (5th edition)
- Conclusions and decisions of the European Committee of Social Rights may be consulted at http://www.coe.int/T/E/Human_Rights/Esc/
- Digest of the Case Law of the European Committee of Social Rights (available at http://www.coe.int/T/E/Human_Rights/Esc/)
- The right to organise and to bargain collectively - protection within the European Social Charter, Social Charter monograph No. 5 (2nd edition), ISBN 92-871-4707-8
- Fundamental social rights - case law of the European Social Charter (2nd edition). ISBN 92-871-4932-5

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