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Contribution of the Council of Europe

Non-discrimination as guaranteed by the European Social Charter

The European Social Charter¹ and the Revised Charter, provides protection from discrimination. Article E of the Revised European Social Charter, the horizontal clause, states:

"The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health association with a national minority, birth or other status"².

Article E draws its inspiration from Article 14 of the European Convention on Human Rights. It takes up the principle of non-discrimination which was set forth in the Preamble of the Social Charter of 1961 and incorporates it into the main body of the Revised Charter.

Article E prohibits all forms of discrimination. It confirms the right to non-discrimination which is established implicitly or explicitly by a large number of Charter provisions. The insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the fundamental rights contained therein. Its function is to help secure the equal effective enjoyment of all the rights concerned regardless of the specific characteristics of certain persons or groups of persons.³

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. The 1996 Revised European Social Charter, which came into force in 1999, is replacing the initial 1961 treaty. 43 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 1961 European Social Charter contains a similar provision in its Preamble.

³ *Autism-Europe v. France*, Complaint No. 13/2000, decision on the merits of 4 November 2003, §51.

It does not constitute an autonomous right which could in itself provide independent grounds for a complaint.⁴

The prohibited grounds for discrimination in Article E are a combination of those listed in Article 14 of the European Convention on Human Rights and those in the Preamble to the 1961 Charter.

The expression “or other status” means that this is not an exhaustive list. Moreover, the Committee has expressly stated that disability is a prohibited ground for discrimination although it is not listed as such in the article.⁵

The European Committee of Social Rights (“the Committee”)⁶ considers that “Article E not only prohibits direct discrimination but also forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all” (Collective Complaint No. 13/2002, *Autisme-Europe v. France*, § 53).

As a general principle, the Committee affirmed that ensuring equal treatment requires a precise body of law prohibiting discrimination, as well as legal and political measures to realise equality in practice and make the prohibition of discrimination fully effective.

The Revised Charter provides for the prohibition of discrimination both in employment and in certain fields outside employment.

The principle of non-discrimination has given rise to an extensive case law established during the supervision by the Committee of state compliance with the Charter. This provides insight into the nature and scope of the various provisions in relation to which non-discrimination is relevant.

1. Prohibition of discrimination in employment

i. General prohibition of discrimination in employment:

Any discrimination in employment, direct or indirect, must be prohibited in domestic legislation. Under Article 1§2 legislation should prohibit discrimination in employment at least on grounds of race, ethnic origin, religion, disability, age, sexual orientation and political opinion. The

⁴ *Autism-Europe v. France*, Complaint No. 13/2000, decision on the merits of 4 November 2003, §51.

⁵ *Autism-Europe v. France*, Complaint No. 13/2000, decision on the merits of 4 November 2003, §51.

⁶ 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 fifteen 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.

discriminatory acts and provisions prohibited by this provision are ones that may occur in connection with recruitment or with employment conditions in general (in particular, remuneration, training, promotion, transfer and dismissal or other detrimental action).

In addition, legal measures should make the prohibition of discrimination effective. They must at least include:

- the power to set aside, rescind, abrogate or amend any provision contrary to the principle of equal treatment which appears in collective labour agreements, in employment contracts or in firms' own regulations;
- appropriate and effective remedies in the event of an allegation of discrimination; including an appropriate adjustment of the burden of proof which should not rest entirely on the complainant;
- protection against dismissal or other retaliatory action by the employer against an employee who has lodged a complaint or taken legal action;
- in the event of a violation of the prohibition of discrimination, sanctions that are a sufficient deterrent to employers as well as adequate compensation proportionate to the damage suffered by the victim.

The following measures also contribute to combating discrimination in accordance with Article 1§2 of the Charter:

- recognising the right of trade unions to take action in cases of employment discrimination, including action on behalf of individuals;
- granting groups with an interest in obtaining a ruling that the prohibition of discrimination has been violated the right to take collective action;
- setting up a special, independent body to promote equal treatment, particularly by providing discrimination victims with the support they need to take proceedings.

As regards discrimination on grounds of nationality while it is possible for states to make foreign nationals' access to employment on their territory subject to possession of a work permit, they cannot ban nationals of States Parties, in general, from occupying jobs for reasons other than those set out in Article G⁷ of the Revised Charter. The only jobs from which foreigners may be banned therefore are those that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority.

ii. Disability

⁷ Article G provides that restrictions on the rights guaranteed by the Revised Charter are admitted only if they are prescribed by law, serve a legitimate purpose and are 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.

Discrimination on grounds of disability in employment is also prohibited by Article 15 of the Revised Charter, which requires that in addition, there must be obligations on the employer to take steps in accordance with the requirement of reasonable accommodation to ensure effective access to employment and to keep in employment persons with disabilities.

iii. Equal treatment of women and men in employment:

Article 20 guarantees equal treatment between women and men in employment with respect to access, remuneration and other working conditions⁸, including dismissal vocational training and guidance, promotion, and social security. All discrimination based on sex, whether direct or indirect, must be prohibited. The principle of equality applies to all employees in private and public sectors, full-time or part-time employees. Equal treatment must be enshrined in law and any legislation, regulation, administrative or other measure that fails to comply with the equality principle must be repealed or revoked. Appropriate and effective remedies must be provided by national legislation, the burden of proof must be alleviated, and adequate compensation for the victim available. Employees who seek to enforce their right to equal treatment must be legally protected against any form of reprisals from their employers, including not only dismissal, but also downgrading, changes to working conditions and so on.

Article 4§3 of the Charter guarantees the right to equal pay without discrimination on grounds of sex. This is one aspect of the right to equal opportunities in matters of employment guaranteed by Article 20. In assessing the compliance of national situations with the requirements of Article 4§3, the Committee has considered several issues:

- whether there is an express legal basis for equal pay⁹;
- whether there are adequate guarantees of enforcement of the right to equal pay and whether the domestic law of states provides for appropriate and effective remedies in the event of alleged wage discrimination. In this regard, the Committee found situations of non-conformity where there is an upper limit on the amount of compensation that may be awarded in gender discrimination cases¹⁰, as well as in situations where there is no possibility for reinstatement following unlawful dismissal relating to equal pay claims¹¹, and where there is no shift in the burden of proof in favour of the plaintiff in discrimination cases¹²;
- whether States have sound job classification systems in place and whether they ensure pay transparency so that jobs can be compared

⁸ The right to equal pay for work of equal value is also covered by Article 20, although there is a specific provision in the Charter on the right to equal pay (Article 4§3)

⁹ Conclusions 2018, Georgia, Article 4§3: the situation in Georgia was found not to be in conformity with the Charter for lack of statutory guarantee of equal pay in the private sector

¹⁰ Conclusions 2018, Armenia, Article 4§3

¹¹ Conclusions 2018, Iceland, Article 4§3

¹² Conclusions 2018, the Russian Federation, Ukraine, Article 4§3

with a view to facilitating the detection of the cases of unequal pay for equal work or work of equal value¹³;

- whether the enforcement of the right to equal pay is effective, as regards the measures taken to reduce the gender pay gap in practice. The Committee observed that in some States Parties, the gender pay gap is persistently high, above 25%, demonstrating that the enforcement of the right to equal pay is not effective¹⁴.

iv. Prohibition of discrimination on grounds of family responsibilities

Under Article 27§1a of the Revised Charter States should provide people with family responsibilities with equal opportunities in respect of entering, remaining and re-entering employment since these persons may face difficulties on the labour market due to their family responsibilities.

Therefore, measures need to be taken by States to ensure that workers with family responsibilities are not discriminated against due to these responsibilities and to assist them to remain, enter and re-enter the labour market, in particular in the field of vocational guidance, training and re-training

2. Prohibition of discrimination outside employment

On grounds such as nationality, social or ethnic origin, disability or age in fields such as:

i. Education and vocational training:

Article 17 of the Revised Charter guarantees that equal access to education must be ensured for all children. All education provided by states must fulfil the criteria of availability, accessibility, acceptability and adaptability. In this respect particular attention should be paid to vulnerable groups such as children from minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant teenagers, teenage mothers, children deprived of their liberty, children with disabilities, etc. Where necessary special measures should be taken to ensure equal access to education for these children.

As to schooling of Roma children, while educational policies for Roma children may be accompanied by flexible structures to meet the diversity of the group and may take into account the fact that some groups lead an itinerant or semi-itinerant lifestyle, there should be no separate schools for Roma children.¹⁵

Article 10 guarantees that equal access to vocational training, including higher education, apprenticeship and continuing training, must be ensured. Article 15 specifically guarantees the right of persons with disabilities to education,

¹³ Conclusions 2018, the Republic of Moldova, Article 4§3: the Committee has found that the Republic of Moldova fails to meet the requirements of this provision as long as it does not allow pay comparisons across companies in the private sector, even where these companies are part of the same holding.

¹⁴ Conclusions 2018, Armenia, Azerbaijan, Estonia, Article 4§3

¹⁵ European Roma and Travellers Forum (ERTF) v. France, complaint No. 119/ 2015 decision on the merits of 5 December 2017.

employment and to participation in the life of the community. The Committee has considered that the non-discrimination norm is integral to Article 15, therefore non discrimination legislation is required in the field of education. Article 15§1 of the Charter does not leave States Parties a wide margin of appreciation when it comes to choosing the type of school in which they will promote the independence, integration and participation of persons with disabilities, as this must clearly be a mainstream school. The margin of appreciation applies only to the means that states deem most appropriate to ensure that assistance is provided.¹⁶

ii. housing

Article 16 and Article 31 of the Revised Charter guarantee housing rights, these must be made equally available to all members of the population.¹⁷

iii. social security and social assistance

The guarantee of equal treatment within the meaning of Article 12§4 of the Revised Charter requires states to remove all forms of discrimination from their social security legislation against foreigners in so far as they are nationals of other States Parties.

Both direct and indirect discrimination are covered. National legislation cannot reserve a social security benefit to nationals only, or impose extra or more restrictive conditions on foreigners, neither may national legislation stipulate eligibility criteria for social security benefits which, although they apply without reference to nationality, are harder for foreigners to comply with and therefore affect them to a greater degree.¹⁸ However, legislation may require a completion of a period of residence for non-contributory benefits. In this respect, Article 12§4 requires that any period of residence is reasonable.

iv. health

The right to protection of health guaranteed in Article 11 of the Charter complements Articles 2 and 3 of the European Convention on Human Rights - as interpreted by the European Court of Human Rights - by imposing a range of positive obligations designed to secure its effective exercise.

As part of the positive obligations that arise by virtue of the right to the protection of health, States Parties must provide appropriate and timely care on a non-discriminatory basis, including services relating to sexual and reproductive health.

In this respect, a health care system which does not provide for the specific health needs of women and/or does so in a discriminatory manner, will not be

¹⁶ (European Action of the Disabled (AEH) v. France, Complaint No. 81/2012, decision on the merits of 11 September 2013.

¹⁷ European Roma Rights Center (ERRC)v. Greece, Collective Complaint No. 15/2003, decision on the merits 8 December 2004, European Roma Rights Center (ERRC) v. Italy, Complaint No. 27/2004 decision on the merits 7 December 2005, European Roma Rights Center (ERRC) v. Bulgaria , No. 31/2005, decision on the merits 31 October 2006.

¹⁸ Conclusions XIII-4, Statement of Interpretation on Article 12, p. 43.

in conformity with Article 11, or with Article E of the Charter taken together with Article 11.¹⁹

v. transport, telecommunications, cultural and leisure activities.

The right of persons with disabilities to social integration provided for by Article 15§3 implies that barriers to communication and mobility be removed in order to enable access to transport (land, rail, sea and air), housing (public, social and private), cultural activities and leisure (social and sporting activities).²⁰ To this purpose Article 15§3 requires:²¹the existence of comprehensive non-discrimination legislation covering both the public and private sphere in fields such as housing, transport, telecommunications and cultural and leisure activities and effective remedies for those who have been unlawfully treated.

¹⁹ See International Planned Parenthood Federation – European Network (IPPF EN) v. Italy, Complaint No. 87/2012, decision on the merits of 10 September 2013, §189-194 and Confederazione Generale Italiana de Lavoro (CGIL) v. Italy, Complaint No 91/2013, decision on the merits of 12 October 2015 §204-213

²⁰ Conclusions 2005, Norway, p. 558.

²¹ Conclusions 2007, Slovenia, p.1033.

Further information on the European Social Charter can be obtained by using the following link: <http://www.coe.int/socialcharter>

For further information, please contact:

Department of the European Social Charter
Directorate General of Human Rights and Rule of Law
Directorate of Human Rights
Council of Europe
F – 67075 Strasbourg Cedex
social.charter@coe.int