

OSCE Human Dimension Implementation Meeting

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Working sessions 4, 14, 15, 16 and 17

“Tolerance and non-discrimination I and II”

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.

The European Committee of Social Rights ("the Committee")³ 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,

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 1961 European Social Charter contains a similar provision in its Preamble.

³ 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.

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.

In particular, the Charter provides for:

1. Prohibition of discrimination in employment:
 - general prohibition of discrimination in employment (Article 1§2);
 - the right of women and men to equal treatment and equal opportunities in employment (Article 20);
 - prohibition of discrimination on the basis of family responsibility (Article 27).
2. Prohibition of discrimination outside employment:
 - prohibition of discrimination of non-nationals on the ground of nationality or other conditions (residence or employment periods) with respect to the enjoyment of social rights (Articles 12, 13, 14, 31);
 - right to equal treatment in education and vocational training (Articles 10 and 17);
 - right of persons with disabilities to social integration and participation in the life of the community (Article 15);
 - right to social, legal, and economic protection of family, including non-nationals and minorities as Roma/Gypsies (Article 16);
 - right of migrant workers to non-discrimination (Article 19);
 - right of elderly persons to social protection (Article 23).

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 a valuable insight into the nature and scope of the various provisions in relation to which non-discrimination is relevant.

The principle of non-discrimination entails:

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 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 alleviation of the burden of proof in favour of the Plaintiff;
- 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 G⁴ 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. 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 conditions, including dismissal and other forms of detriment, 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 both 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

⁴ 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.

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. Under Article 27, national legislation shall not discriminate between sex when taking into account the specific employment and social security needs of workers with family responsibilities (part-time, unemployment periods, pension, parental leave, etc.)

2. Prohibition of discrimination outside employment

i. Prohibition of discrimination of non-nationals on the ground of nationality or other conditions (residence or employment periods) with respect to the enjoyment of social rights:

Several provisions of the Charter guarantee substantive social rights (social security, social assistance, access to social services, access to education, housing, etc.). With respect to the enjoyment of these rights, the case law of the European Committee of Social Rights prohibits any direct and indirect discrimination of non-nationals of other States Parties to the Charter in so far as they are lawfully resident or working regularly within the territory of the Parties (Appendix to the Charter). Prohibition of direct discrimination means discrimination on the ground of nationality or the application of the reciprocity clause. As to indirect discrimination, it means imposing conditions of entitlement which although applicable regardless to nationality are more difficult to be satisfied by foreigners. These conditions most often are length of residence or period of employment requirements. With respect to access to certain rights, the European Committee of Social Rights allows a length of residence requirement, but it should not be unreasonable in relation to its purpose and should be proportional (for example, non-contributory social security benefits, access to social services, family reunion).

ii. Education and vocational training:

Article 17 of the Revised Charter guarantees that equal access to education must be ensured for all children. 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, etc. Where necessary special measures should be taken to ensure equal access to education for these children.

Article 10 guarantees that equal access to vocational training, including higher education, apprenticeship and continuing training, must be ensured.

iii. Persons with disabilities:

Article 15 guarantees the right of persons with disabilities to education, 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, employment and in fields such as housing, transport, telecommunications, cultural and leisure activities.

iv. The family, including non-nationals and minorities as Roma/Gypsies:

Article 16 guarantees that the family is granted legal, economic (access to family benefits) and social protection (access to childcare and housing). There is a prohibition of discrimination with respect to families of non-nationals and minorities, such as Roma/Gypsies (Collective Complaint No. 15/2003, *ERRC v. Greece*, on the right to housing).

v. Migrant workers:

See the contribution of the Council of Europe on migrant workers, Working Session 2.

iv. Elderly persons:

Article 23 of the Charter guarantees the right of elderly persons to social protection. The Committee requires the existence of legislation prohibiting discrimination on grounds of age.

Further information on non-discrimination and the European Social Charter can be obtained from the following publications:

- The European Social Charter - Collected texts (4th edition), ISBN 92-871-5253-5
- Conclusions and decisions of the European Committee of Social Rights to be consulted on the website www.coe.int and the Charter database <http://hudoc.esc.coe.int>.
- Equality between men and women in the European Social Charter, Social Charter monographs - No 2, (2nd edition), ISBN 92-871-4410-9
- Fundamental social rights- case law of the European Social Charter (2nd edition). ISBN 92-871-4932-5

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