

Social Welfare Rights and the European Social Charter

COLM O'CONNOR
UCL,
Vice-President ECSR

‘Social Welfare Rights’

- Distinction between *social security* and *social assistance* (Articles 12/13 ESC).
- Distinction blurred in *non-contributory* systems like Ireland, but nevertheless remain important – *Bismarck v Beveridge*.
- Rights of ‘last resort’, or ‘social entitlement’?
- Individual rights or general entitlements?
- Context-dependant? Is ‘regression’ possible, even for example in the current economic climate?
- How should the interaction between discrimination and social welfare rights be conceptualised, e.g. in the gender context, or ethnicity?

Some Relevant International HR Standards

- **Article 9 ICESCR** – ‘The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.’
- **Article 11(1) ICESCR** – ‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right...’
- **ILO standards** - Social Security (Minimum Standards) Convention, 1952 (No. 102); the Equality of Treatment (Social Security) Convention, 1962 (No. 118); the Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121); the Invalidity, Old-Age and Survivors’ Benefits Convention, 1967 (No. 128); the Medical Care and Sickness Benefits Convention, 1969 (No. 130); the Maintenance of Social Security Rights Convention, 1982 (No. 157); the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168); and the Maternity Protection Convention, 2000 (No. 183).

European Instruments

- **European Code of Social Security** (Council of Europe) – standard-setting.
- **EU Social Security Directives** – focused on free movement.
- **EU Charter of Fundamental Rights** – assorted provisions, including Art 33 right of the family to social and legal protection (similar to ICESCR); but in particular, see Article 34 of the Charter on ‘Social Security and Social Assistance’:
 1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.’
- **NB:** Note *limits* on the scope of the EU Charter – Arts. 51(1) (‘only Union law’); 51(2) (no extension of competency)

The ECHR

- Indirect protection of social welfare rights, via Articles 2 and 3 (*Limbuela*), Art. 8 (*Enfield*, *O'Donnell*), Art. 6, Art. 14 (*Stec v UK*).
- 'Minimum floor', plus procedural justice and non-discrimination.
- Potential remains untapped, but hemmed in by the Convention's civil-political focus.
- Similar situation in many national constitutions, including Ireland?

The European Social Charter

European Social Charter, signed in Turin on 18 October 1961 – socio-economic equivalent of the ECHR – supplemented by the 1988 Additional Protocol.

Protocol amending the European Social Charter, signed in Turin on 21 October 1991 - not in force yet since has not been ratified by all the Parties to the ESC, but implemented in general ('the Turin Protocol').

Additional Protocol to the European Social Charter Providing for a System of *Collective Complaints*, signed in Strasbourg on 9 November 1995 - in force since 1 July 1998

European Social Charter (revised), signed in Strasbourg on 3 May 1996 - in force since 1 July 1999 – Ireland has ratified this instrument, plus the 1995 Additional Protocol.

The General Categories of Rights Guaranteed by the Charter

- Housing
- Health
- Education
- Employment
- Art 12 – social security
- Art 13 – social assistance
- Legal and social protection
- Movement of persons
- Non-discrimination

The Charter Requirements

1. The ‘à la carte’ approach - see Article A of the Revised ESC, according to which each of the Parties undertakes:

1. to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part;

2. to consider itself bound by at least six of the following nine articles of Part II of this Charter: Articles 1 (right to work), 5 (freedom of association), 6 (collective bargaining), 7 (special protection of children in employment), 12 (right of workers to social security), 13 (social and medical assistance for persons without resources), 16 (protection of the family), 19 (protection of migrant workers) and 20 (non-discrimination in employment on grounds of sex);

3. to consider itself bound by an additional number of articles or numbered paragraphs of Part II of the Charter which it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles [out of a total of 31; under the 1961 ESC, 10 out of a total of 19] or sixty-three numbered paragraphs [out of a total of 97 paragraphs].

Charter Requirements (2)

However :

- reports are requested on the non-accepted provisions of the Charter (article 22 of the 1961 Charter, made applicable to the Rev. ESC)
- by ratifying the Charter, the States parties agree to consider ‘as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which’ all the rights and principles of the Charter are effectively realized (part I of the Charter)
- Portugal has accepted all the provisions of the Rev ESC; other States have accepted almost all the provisions, including France.

Article 12 ESC – Right to Social Security

Article 12 – ‘All workers and their dependants have the right to social security.’

1. With a view to ensuring the effective exercise of the right to social security, the Parties undertake to establish or maintain a system of social security;
(ECSR case-law requires a functioning social system; collectively financed; sufficient coverage; adequate benefits in reasonable proportion to the previous income and not below the poverty threshold defined as 50% of median equivalised income)
2. ...the Parties undertake to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
3. ...the Parties undertake to endeavour to raise progressively the system of social security to a higher level;
4. ...the Parties undertake to take steps, by the conclusion of appropriate bilateral and multilateral agreements...in order to ensure:
 - a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits...; *(however note Appendix – residence requirements)*
 - b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

Article 13 – right to social assistance

Art. 13 - Anyone without adequate resources has the right to social and medical assistance.

1. With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources.. be granted adequate assistance, and, in case of sickness, the care necessitated by his condition.

(ECSR case-law: limits on conditionality, adequacy of level and forms of assistance, ability to appeal denial, availability to non-nationals in need)

2. ...persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights.'
3. the Parties undertake to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want.
4. ...equal footing with their nationals to nationals of other Contracting Parties *lawfully* within their territories.' However, see Complaint 14/2003, FIDH v France – scope of Art 13(4) extended to certain forms of emergency social and medical assistance for foreigners illegally present.

Other ESC Provisions of Relevance

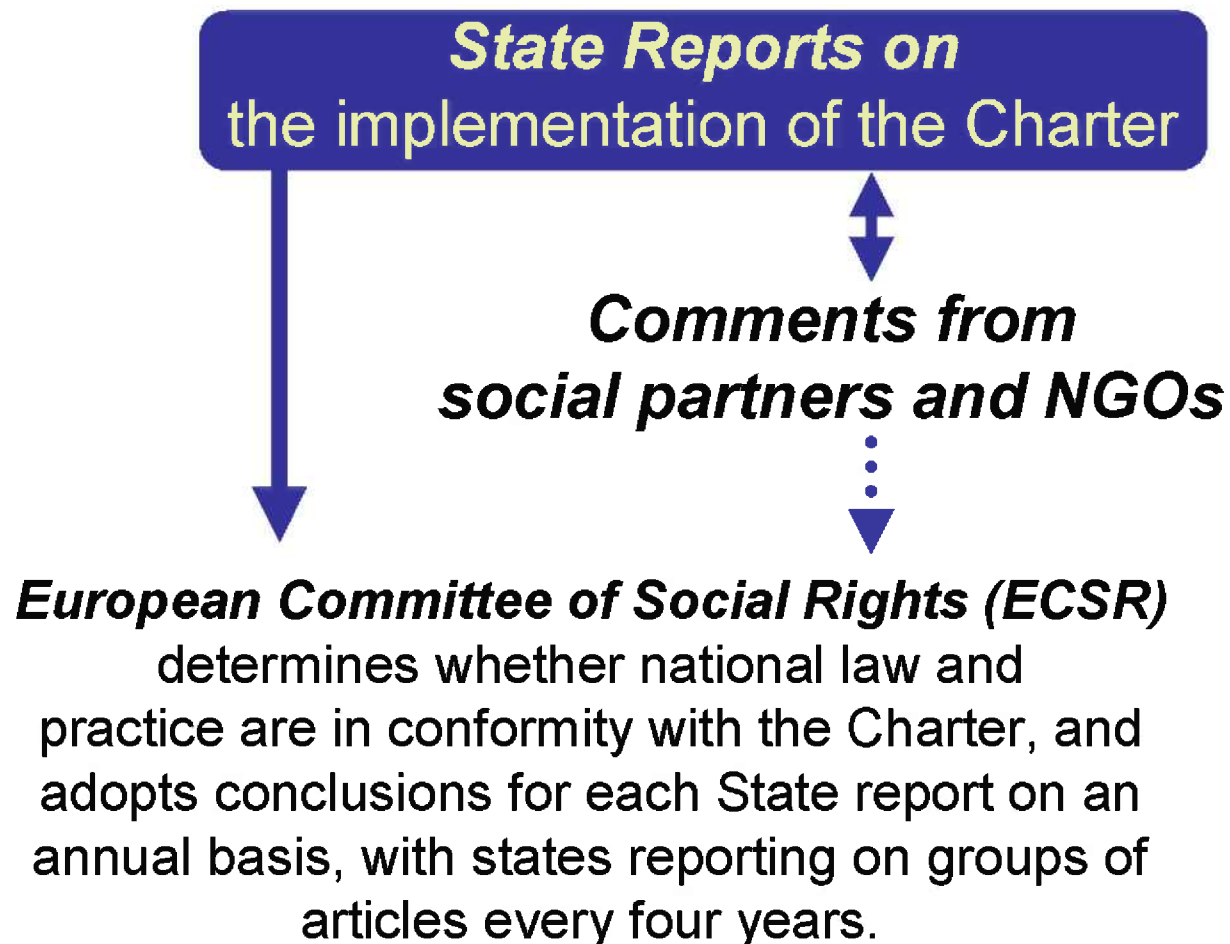
- Article 30 – right to protection against poverty
- Article 31 – right to housing
- Article 23 – social protection of elderly
- Article 17 – right of children to social protection
- Article 16 – right of families to social protection
- Article 15 – rights of disabled persons to participation and independence
- Article 14 – right to benefit from welfare services, and
- **Article E – non-discrimination** (gender, Roma, disabled persons etc.) – applied by the ECSR in collective complaints concerning housing, access to health care, social protection of families and children, etc.

Monitoring and Enforcement

- **European Committee on Social Rights (ESCR)** – independent experts, 15 in total, elected by Committee of Ministers.
- **State reports** - ‘classical’ system of monitoring via periodic national reports, on which the ECSR bases its conclusions on state conformity with the Charter.
- **Collective complaints** – a unique adjudication mechanism, collective in nature, established by the 1995 Additional Protocol, 14 states have ratified, including Ireland.

The National Reporting Monitoring Procedure

Legal assessment by
the ECSR



National Reports

Follow-up

Governmental Committee

Representatives of the States Parties

Observers representing social partners

Purpose is to ensure that States bring situations into conformity with the Charter.

Or it may invite the Committee of Ministers to adopt a Recommendation for the State in question.



Committee of Ministers

May make Recommendations asking States to bring national law and practice into conformity with the Charter.

The Collective Complaints Procedure

Those entitled to lodge complaints:

In the case of all states that have accepted the procedure, including Ireland:

- 1. the ETUC, UNICE, and the IOE;
- 2. non-governmental organisations (NGOs) with participative status with the Council of Europe which are on a list drawn up for this purpose by the Governmental Committee, such as World Organisation against Torture, Interights, International Federation of Human Rights Leagues, Defence of Children International;
- 3. employers' organisations and trade unions in the country in question, e.g. IBEC, ICTU in the case of Ireland.

In the case of states which have also agreed to this (only Finland):

- 4. national NGOs.

EXAMPLES OF COLLECTIVE COMPLAINTS (1)

- Complaint 13/2002, *Autism-Europe v France*, Decision of 7th November 2003, the ECSR rejected the complaint's argument that funding for education for autistic children should come from the education rather than the health budget.
- However, the Committee noted that France had made little progress in securing the participation of autistic persons in mainstream education or in providing adequate resources to meet their special educational needs; that use was still being made of a more restrictive definition of autism in educational policy than that adopted by the World Health Organisation; and that there were insufficient official statistics with which to rationally measure progress.
- These deficiencies in French policy taken together as a whole ensured that France was not meeting its Charter obligations under Articles 15 and 17 and the non-discrimination clause Article E of the revised Social Charter.

EXAMPLES OF COLLECTIVE COMPLAINTS (2)

- In Complaint No. 33/2006, *International Movement ATD Fourth World v. France*, the Committee concluded that France was not in conformity with the Charter on the basis that the allocation of public housing was failing to meet the needs of the most disadvantaged groups in French society, thereby violating Article 30 (right to protection against poverty and social exclusion), and Article 31 (right to housing) of the Revised Social Charter.
- The Committee clarified that a margin of appreciation was left to state parties in allocating resources, and the Charter did not impose an obligation of “results” upon the French government.
- However, the Committee reiterated that the rights recognised in the Social Charter “must take a practical and effective, rather than purely theoretical, form”, with the result that state parties must “to make available the resources and introduce the operational procedures necessary to give full effect” to Charter rights, including taking measures such as maintaining statistics and reviewing the operation of systems of social support and taking reasonable steps to ensure “steady progress” towards full implementation of the rights.

EXAMPLES OF COLLECTIVE COMPLAINTS (3)

- Complaint No. 48/2008, *European Roma Rights Centre v. Bulgaria* – denial of unemployment relief after 6 months, disproportionate impact on Roma.
- ‘The Committee recalls that under Article 13§1 adequate benefits must be payable to “any person” who is without adequate resources and in need. The text of Article 13§1 clearly establishes that this right to social assistance takes the form of an individual right of access to social assistance in circumstances where a basic condition of eligibility is satisfied, which occurs when no other means of reaching a minimum income level consistent with human dignity are available to that person.’
- ‘States may establish a link between access to this right and a willingness to seek employment or to receive vocational training. However, access cannot be made subject to time-limits, if the persons affected continue to meet the basic condition for eligibility established by Article 13§1. Reducing or suspending social assistance benefits may only be in conformity with the Charter if they do not deprive persons in need of their means of subsistence.’
- The Committee also considers it has received insufficient evidence to indicate that alternative forms of social assistance provision exist in Bulgaria to ensure that persons denied monthly social assistance can obtain adequate resources to live in a manner compatible with their human dignity...’

Ireland and the ESC

- In terms of the national reporting procedure, note the failure to report in the most recent cycle, 2008, on employment, training and equal opportunities, including Article 15 on rights of disabled persons – one of the very few countries that failed to report.
- In Conclusions 2006, the level of sickness and unemployment benefit was found to be incompatible with Article 12(1), as in the absence of supplemental payments for dependant adults or children, the levels of payment were insufficient when compared to the poverty line;
- Article 12(4) also violated – inability of non-EU nationals to accumulate benefits.
- Articles 13 and 16 = conformity.

IFHRL v Ireland

- Complaint 42/2007, **International Federation of Human Rights Leagues (IFHR) v. Ireland** - denial of free rail travel to those in receipt of state pensions but who are not resident in Ireland
- ‘The Committee considers that States may legitimately restrict the scope of application of measures adopted to give effect to Article 23 (right of elderly persons to social protection) to residents, individuals regularly working in the State concerned, or to persons with an equivalent degree of full membership of the society of the State concerned, if such a restriction is reasonable and does not constitute a denial of the core entitlement of elderly persons to essential social protection.’
- ‘The Committee observes...that the benefit in issue in the present case cannot be deemed to be related to any of the social security rights covered by Article 12 of the Charter. The benefit in question is not a statutory right and cannot be classified as benefits ‘arising out of social security legislation’ within the meaning of Article 12§4.’

Questions to Consider

- There is a need to think rigorously about social rights – a breach of these rights is not the same as a bad decision, or a questionable policy choice.
- The regression issue – compatibility with Art. 12(3) ESC?
- Discrimination and social rights – an uneasy combination of legal concepts?
- Welfare rights – basic support or social entitlement?
- What does ‘human rights budgeting’ look like? It cannot be just how NGOs would prepare a budget!
- How seriously do we want to take social rights? Are the ESC mechanisms doing any good? What will be the future of collective complaints? What about the ICESCR Protocol?