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60 years of the European Social Charter, 25 years of the Revised Charter – Germany's role in the renewal process

The European Social Charter (ESC) is an international treaty drawn up by the Council of Europe with the aim of upholding and protecting democracy, the rule of law and human rights. Since 1961, the ESC has been the central instrument in Europe for guaranteeing social rights. In 1996, it was expanded and restructured by the revised ESC. Of the 47 member states of the Council of Europe, all but four have ratified the ESC in its original or revised version. This can be considered a great success for the political support of social human rights in Europe. On the other hand, there are nevertheless doubts about the willingness of states to reform.

The ESC was created as a complement to the European Convention on Human Rights and its guarantee of civil and political rights, because this complement is indispensable for an adequate level of protection. Civil rights, too, can only be exercised if the requisite economic and social conditions exist in a society. Therefore, human rights are not only interwoven in terms of content, they form an indivisible unit. Nevertheless, the willingness of European states to recognise social rights is less pronounced than it is for civil and political rights. The Federal Republic of Germany was one of the early signatories to the old ESC, but it took 25 years to accept the revised ESC. After Germany's ratification only eight member states[1] of the Council of Europe still adhere to the original version and do not yet participate in the modernisation. However, also the German ratification instrument is accompanied by numerous restrictions and reservations, and thus does not yet contain the hoped-for broad political support for the reform process.

Nevertheless, an important step has been taken with the ratification, which translates into concrete action the increased importance of social policy for crisis management. A human rights instrument can only fulfil its protective purpose if it provides adequate answers to the problems of the present. To do so, it needs to be continually reviewed and modernised. A human rights guarantee that was adapted to the social issues which prevailed in 1961 cannot always provide sufficient answers to the current dangers to social cohesion. Updating social standards also serves to promote a common self-image in Europe, to which the "European social model" makes a decisive contribution. The ESC is an expression of the common aspiration to promote a convergence at the highest possible level of social standards among member states. Nevertheless, in the 60 years of its existence it has not yet been able to fully realise this potential. An anniversary therefore provides an opportunity to revisit the possible causes of these weaknesses.

Monitoring the implementation of social rights in the States Parties

By ratifying the ESC, the signatory states commit themselves to actually guaranteeing their citizens the social rights they recognise. If this does not happen, or does not happen to a

[1] Editorial note: following the entry into force of the Revised ESC for Spain on 1 July 2021, only seven states are currently bound by the old ESC.

sufficient extent, citizens have no possibility to claim these rights directly in court, because unlike the European Convention on Human Rights (ECHR), there is no independent court for the ESC to which citizens can turn in case of implementation deficiencies. However, the implementation of social rights in the signatory states is not entirely without legal control. Based on the control mechanisms of the International Labour Organisation (ILO), the ESC provides for a two-track procedure. On the one hand, the States Parties *report at* regular intervals on the status of the implementation of the ESC in law and in practice; on the other hand, social partners and certain non-governmental organisations can use the *collective complaints procedure* in order to have what they consider to be a deficit in implementation reviewed.

The monitoring body for both these procedures is the "European Committee of Social Rights" (ECSR), which is established by the ESC expressly for this purpose. As an independent and impartial body of experts, it examines whether the States Parties comply with the obligations they undertook when they ratified the ESC. If the ECSR identifies implementation deficiencies during the review, it can only point them out; the Charter does not provide for sanctions. In the final analysis, the Committee of Ministers of the Council of Europe could make formal recommendations to a state to remedy the identified deficiencies and thus fulfil its treaty obligations.

The state reporting procedure

The reporting procedure is the central monitoring mechanism of the ESC to which all States Parties are subject as of ratification, whereas the collective complaints procedure is laid down in an additional protocol to the ESC, which is optional and can therefore only be applied to those States that also ratify this protocol. Although the reporting procedure is widely used in international law, it seems that the purposes pursued by it are not always clear. Some governments complain mainly about the human and financial resources required to prepare the reports, and feel "punished" if the ECSR finds faults with their implementation of the ESC. This can be explained by a certain annoyance about the result, but such a reaction does not sufficiently take into account the positive aspects of the procedure. In principle, an alignment of standards is economically advantageous for all states involved. The establishment of a body to monitor such standards may ensure a "level playing field" for all, so that no one gains a competitive over the others by undercutting social standards. Social standards should be progressively achieved by all thus eliminating the costs of such standards as a competition factor. Monitoring and, if necessary, complaints lodged before the ECSR are an important means of achieving a uniform minimum level of protection of social rights in Europe.

The standards by which the situation in the States Parties can be reviewed were accepted by states through ratification of the ESC. In its Part I, the Charter explicitly contains the principles on whose progressive realisation all signatory states have agreed, even if they did not yet fully ratify the associated rights that are only formulated in detail in Part II of the ESC. The common standards are indispensable in Part I as an objective of the social policy of the States Parties, even the fact that the ESC to a certain extent allows a selection of the ratified provisions of Part II does not change this.

The reporting obligation is sometimes treated as an annoying formal exercise that most of all is a burden on states. However, this would be to misjudge the efficiency of this procedure. It enables the identification not only of implementation deficits, but also of successes, which can provide other states with know-how and best practices for their own legal development. It promotes the participation of the relevant social partners, who are allowed to comment on the reports and thus help to identify possible problems at the implementation level at an early stage. Moreover, even if the ECSR identifies breaches of the ESC, its conclusions do not have the character of sanctions. On the one hand, they could not actually fulfil this function in a strict judicial sense because no adverse legal consequences are triggered by a conclusion of non-conformity with the ESC. On the other hand, it is also not the purpose of the conclusions to issue a reprimand as such, but to initiate a process of change that leads to improvements in the common interest of states and their citizens. A subsequent domestic use of the ECSR's conclusions not only serves to integrate civil society, with its interests and experiences, into he process of change, but also promotes a coordinated approach by state institutions with different areas of competence.

The potential of the reporting procedure in contributing to the promotion of social cohesion as a prerequisite for democracy and prosperity is far from exhausted. The current health crisis is striking evidence of the detrimental, in some cases even life-threatening, effects of inadequately organised and financed social systems on citizens and states. If the conclusions of the ECSR serve as a warning system for this, it clearly contributes to social protection. However, this does not mean that the reporting procedure no longer has potential for improvement. The fact that it involves a considerable amount of work for the lead ministries and other national authorities, and also that its reporting periods may be unduly rigid, are well-known topics of discussion, and can be addressed in an ongoing reform process.

The collective complaints procedure

The 1995 Additional Protocol providing for a system of collective complaints, which entered into force in 1998, has so far been ratified by only 15 States Parties.[2] Although the Parties involved expressly rate the efficiency of the procedure positively, there are also reservations about the procedure that weaken the willingness of other States Parties to participate. However, this procedure is already making a decisive contribution to making social rights more effective. It enables social partners and recognised non-governmental organisations to actively participate in the implementation of social rights. Because these stakeholders are in practice involved in remedying or mitigating social problems, they are also able to identify unintended side effects of regulations at an early stage and can point out the need to take measures to counteract problems. The fact that they can do this in an adversarial procedure, which contains many elements of the proceedings before a court, may contribute to an assumption that this is about a "condemnation" of the respondent states. In fact, the collective complaints procedure, like the state reporting procedure, is about identifying those situations

[2] Editorial note: Now 16, the complaints procedure was accepted by Spain with effect from 1 July 2021.

where the implementation of the ESC is still not adequate. Sanctions or adverse legal consequences are not involved; the respondent state must only subsequently report on the measures it has taken to remedy any violations of the ESC identified.

In practice, however, the public interest in collective complaints is usually higher than in the state reports. This could partly explain why states tend to perceive findings of violations by the ECSR as having a sanctioning effect. This sometimes to leads to criticism or rejection of the procedure itself; the criticism is dressed up in the form that the complaints procedure lacks predictability and legal certainty for those affected. This reflects dissatisfaction with a certain outcome rather than concrete shortcomings of the complaints procedure as such. The fact that formal proceedings are initiated at all is itself an expression of an uncertainty about the concrete meaning of a legal norm; obviously the parties do not agree among themselves what requirements the legal norm lays down. Therefore, the parties do not know what the outcome of a legal review will be. However, the same degree of uncertainty also exists when proceedings reach a national or supranational court (such as the ECtHR or the CJEU). A collective complaint does not create any legal uncertainty over and above this. This is also supported by the fact that the States Parties that have accepted this procedure have expressed a positive opinion on it in a joint statement and explicitly support it.

The States Parties that remain outside the complaints procedure are by no means unaffected by the procedure, even if they do not actively participate in it. The ECSR directly applies the interpretative results developed in decisions in complaints to the reporting procedure, and the implementation problems identified in a complaint are thus systematically tracked for all States Parties to the ECSR. The ECSR asks all other States Parties specific questions about their handling of these problems for the preparation of their next report. Comparable implementation deficiencies are thus subsequently discovered in the reporting system and assessed as incompatible with the ESC, even without the state having accepted the collective complaints procedure. Thus, standing outside the complaints procedure does not prevent the finding of an incompatibility in the medium term, but only the possibility of an explicit decision in the adversarial procedure.

Involvement of national courts

Whether the guarantees of the ESC have been adequately implemented in a State Party is subject to the legal assessment solely of the ECSR. Other bodies of the Council of Europe, such as the Governmental Committee and the Committee of Ministers, are involved in the procedure, but at a different procedural level, which is concerned with the political follow-up, not the legal assessment of the situation. They can therefore neither modify nor overrule the legal ruling made by the ECSR, but can at most refrain from making a recommendation to a state for political reasons.

At the level of the *States Parties,* on the other hand, there is certainly a competence for the interpretation of the ESC, because any application of the law, which is precisely what is required of the States Parties, necessarily presupposes the interpretation of the applicable norm. Therefore, when applying the ESC directly or through national law, the national courts

should determine its legal meaning. However, they may not base this on an arbitrary interpretation, but must be guided by that of the ECSR. Even if this has been disputed by some for a long time, this result is logically compelling, since the ESC must be applied uniformly in all States Parties. If each legal system could bindingly determine for itself the significance of the obligations entered into, the establishment of an international monitoring body would be without purpose. A complaint about inadequate implementation measures is excluded if each state is only bound by its own principles. If the States Parties have introduced a monitoring mechanism, they have also subscribed to a uniform standard of monitoring. It is then necessary for the national practitioners of the law to be guided in their interpretation of ESC provisions by the interpretation that the ECSR has developed. However, this cooperation is only functional if the national courts are familiar with the interpretation of the ECSR, can easily access it and can introduce the special features of their own legal system into the interpretation process.

Concluding remarks

60 years after the entry into force of the ESC and 25 years after the entry into force of the revised version, the Federal Republic has recognised the necessity of adapting and modernising social rights. For a state that values its welfare state, there was no objective reason for this hesitant acceptance; such a reason is also lacking for the many reservations that tend to hinder the renewal process. However, since the ESC must continue to adapt to current challenges such as the financial, environmental and health crises, globalisation, digitalisation and artificial intelligence, the final stage of development has not yet been reached. An upgrading of social rights in order to promote social cohesion in state and society is both necessary and possible - also with the active participation of the German welfare state - as a response to the lessons of the crises.