

THE RIGHT TO COLLECTIVE ACTION UNDER THE EUROPEAN SOCIAL CHARTER

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Abstract

This article gives an overview of the European Social Charter's protection of the right to collective action, including the case law of the European Social Charter (ESC) supervisory body, the European Committee of Social Rights (ECSR). Considering the position of the European Social Charter in relation both to the ECHR and to EU law, the topic certainly merits attention. From the first Conclusions of the ECSR in 1969, there has been a long line of development, and a comprehensive body of case law has been generated, focusing in particular on the right to strike. There has also been both evolution and variation in how the ESC standards have been construed over time, which may be seen as a reflection of the different legal cultures, along with the complexity of the issues involved.

Keywords: Council of Europe; European Social Charter; right to collective action; right to strike

1. INTRODUCTION

The right to strike, a core element of the wider right to collective action, has come to prominence in European labour law and the human rights debate in the past three to four years as a consequence of the case law of the European Court of Justice (ECJ) in the *Viking/Laval* sequel¹ and developments in the case law of the European Court

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¹ I.e. the 2007 decisions in Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779 (*Viking Line*), Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767 (*Laval*), and the 2008 decisions in Case C-346/06 *Rechtsanwalt Dr. Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989 and Case C-319/06 *Commission of the EC v Luxembourg* [2008] ECR I-4323.

of Human Rights (ECtHR). The ECtHR has emphatically reinforced and extended the protection of the right to strike under Article 11 of the European Convention of Human Rights (ECHR)² with, in particular, its decisions in *Demir and Baykara* and *Enerji Yapi-Yol Sen*.³ In so doing, the ECtHR has given due consideration to the Council of Europe convention on social and economic human rights, the European Social Charter of 1961. The ECJ, on the other hand, has effectively restricted the right to strike by subjecting it to the freedom of cross-border establishment and services rules of the Treaty on the Functioning of the European Union (TFEU) Articles 49–55 and 56–62. Thereby, the market economics have taken precedence over the social,⁴ encroaching upon not only the right to strike, but also, more broadly, upon the right to collective bargaining. The result is evident discord and budding conflict with international human rights standards. While the ECJ referred to the fundamental ILO Conventions Nos. 87 and 98⁵ in holding that ‘the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law’,⁶ the Court’s actual construction of EU law is not consonant with the ILO standards. This point has been made clearly by the ILO and its Committee of Experts.⁷

In recognising ‘the right to take collective action’ as a fundamental right in EU law, the ECJ also referred to the Council of Europe’s European Social Charter (ESC, or the Charter),⁸ noting that ‘to which, moreover, express reference is made in Article 136 EC’⁹

² Formally, the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (European Treaty Series (ETS) 5).

³ *Demir and Baykara v Turkey*, Application No 34503/97, Decision 12 November 2008, and *Enerji Yapi-Yol Sen v Turkey*, Application No 68959/01, Decision 21 April 2009. The evolution of standards from the 1970s up to *Demir and Baykara* is well accounted for in paras. 140–146 of the decision itself.

⁴ E.g. C. Barnard ‘Social Dumping or Dumping Socialism?’ (2008) 15 *International Union Rights*, Issue 1, 22–23; and in the same vein, J. Cremers, J.E. Dølvik and G. Bosch ‘Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU’ (2007) 38 *Industrial Relations Journal* 524, 538–39, J. Malmberg and T. Sigeman ‘Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice’ (2008) 45 *Common Market Law Review* 1115, 1136–40.

⁵ Freedom of Association and Protection of the Right to Organise Convention, 1948, and Right to Organise and Collective Bargaining Convention, 1949, respectively. Both Conventions are included in the ILO Declaration on fundamental principles and rights at work, 1998.

⁶ *Viking Line* paras. 43–44, *Laval* paras. 90–91.

⁷ See, in particular, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) International Labour Conference 99th Session 2010 (International Labour Office, Geneva, 2010) 208–209.

⁸ The European Social Charter, 1961 (ETS 35) is supplemented by the European Social Charter (revised), 1996 (RevESC) (ETS 163). States may ratify one or the other; states, having ratified the 1961 Charter, may move instead to the RevESC, as many have done. The RevESC is an updated and expanded social and economic human rights instrument. However, with regard to the right to collective action, the two Charters are identical.

⁹ *Viking Line* para. 43, *Laval* para. 90. Both the ESC and the revised ESC are now also among those human rights conventions that are referred to in the Preamble to the EU Charter of Fundamental Rights [2010] OJ C 83/389, para. five.

(Article 151 TFEU). Even so, the Court did not reflect on the further role and reach of the ESC and its standards protecting the right to collective action. In consequence, the Court's actual construction of EU law again ends up being inconsistent with human right standards otherwise subscribed to by the EU.¹⁰

The purpose of this article is not to discuss the ECJ case law or EU law. The object is, rather, to give an overview of the ESC's protection of the right to collective action, including the case law of the ESC supervisory body, the European Committee of Social Rights (ECSR). Considering the position of the European Social Charter in relation both to the ECHR and to EU law, the topic certainly merits attention. From the first Conclusions of the ECSR in 1969,¹¹ there has been a long line of development, and a comprehensive body of case law has been generated, focusing in particular on the right to strike. There has also been both evolution and variation in how the ESC standards have been construed over time, which may be seen as a reflection of the different legal cultures, along with the complexity of the issues involved.

2. BACKGROUND

Viewed from a labour law perspective, the European Social Charter of 1961 is a milestone in international law. The Charter is often claimed to be the first binding treaty in international law to expressly recognise the right to strike. While this assertion is correct, it is incomplete: there is more to the Charter than the right to strike.

The initiative to prepare a separate European instrument on social and economic human rights was taken in 1951 as an extension of the adoption in 1950 of the ECHR; the drafting process commenced in 1953.¹² During the first phase, the ILO and the ILO Conventions played a very limited role. Provisions were initially appropriated from Convention texts already being drafted by the UN, which was intending to implement either one, or possibly two, Conventions on topics including economic, social and human rights.

The provision on the right to strike was, however, initially based on the corresponding provision in the Inter-American Charter of Social Guarantees of 1948 (the Bogotá Charter).¹³ The inclusion of such a provision in the Charter was first

¹⁰ See, e.g. S Evju 'Norway', in R. Blanpain and A.M. Świątkowski (eds.), 'The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia', *Bulletin of Comparative Labour Relations* 69 (Kluwer, Austin/Boston/a.o., 2009) 123, 134–135.

¹¹ Then called the Committee of Independent Experts (CIE).

¹² For a general overview of the evolution, see, e.g., D. Harris, J. Darcy, *The European Social Charter*, 2nd ed. (Transnational Publishers, Ardsley, NY, 2001), 2, T. Novitz, *International and European Protection of the Right to Strike* (OUP, Oxford, 2003) 136–147, and 'The European Social Charter and International Labour Standards', (1961) 84 *International Labour Review* 354 and 462.

¹³ See Collected 'Travaux Préparatoires' (Provisional edition) (Strasbourg: Council of Europe 1953–1960) (hereafter: PW), Vol. II (1955), 42, 56. Article 27 of the Inter-American Charter stated:

proposed in 1955.¹⁴ Like other parts of the Charter, the proposed provision underwent a number of changes prior to the Charter's adoption in 1961. Following a fleeting glance at the preliminary practice of the ILO bodies, the provision finally adopted was based on a draft text submitted by the secretariat of the Social Committee in October 1956.¹⁵ By November 1957, the formulation of the clause was more or less complete,¹⁶ although it was the object of a good deal of discussion during the 'Tripartite Conference' of 1958.¹⁷ Subject to some minor adjustments, the solution then arrived at became the final version.

3. THE EUROPEAN SOCIAL CHARTER'S PROVISIONS ON COLLECTIVE ACTION: AN OVERVIEW

Article 6(4) of the Charter states:

'With a view to ensuring the effective exercise of the right to bargain collectively, the Parties recognise
(4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.'

This provision remained unchanged in the Revised Charter of 1996 (RevESC).

By way of introduction, three simple observations are appropriate at this point. Firstly, the right to strike is not the only right protected by Article 6(4) ESC, which includes the right to strike within the more wide-ranging concept of 'collective action' – a concept that also encompasses actions taken by employers. Secondly, the right to 'collective action' is neither unconditional nor unlimited. This is partly a direct consequence of the actual wording of Article 6(4), and partly a consequence of the provisions of Article 31 (Article G RevESC) and the gloss to Article 6(4) in the

'Workers have the right to strike. The law shall regulate the conditions and exercise of that right.' The Charter was adopted at the Ninth International Conference of American States, along with the Charter of the Organization of American States (OAS), which was founded at that Conference. Article 27 is now also mirrored in Article 45, c, of the OAS Charter. Further, a provision on the right to strike is included in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (Article 8(1)(b)).

¹⁴ Provisions on the right to strike or to collective action were not included in the ILO Conventions No. 87 (1948) and No. 98 (1949). During the development of Conventions at the UN, a provision on the right to strike was proposed by the Soviet Union, but was rejected in 1952; see UN Economic and Social Council, Official Records, Fourteenth Session, Supplement No. 4 (1952), 21–22, cf. 37–38 and 45.

¹⁵ PW Vol. III (1956), 365, 386–388, 823, 843.

¹⁶ PW Vol. IV (1957), 297, 302.

¹⁷ PW Vol. V (1958), 481–482, 518, 549–551. The 'Tripartite Conference' was convened by the ILO upon request by the Council of Europe. It had a tripartite composition modelled on that of the ILO. See, e.g., D. Harris, J. Darcy (n 12) 5.

Charter's Appendix. The latter provides that a state party may regulate the right to collective action in its national law, but only insofar as is compatible with Article 31.¹⁸ Article 31, which shares some features with the 'reservations clauses' in Articles 8, 10 and 11 ECHR, provides that:

'The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law 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.'

Thirdly, Article 6(4) has been developed through case law, which, effectively, in this context means the practice of the ECSR (or the Committee). The Committee's practice has diverged to a certain extent, both from the practice of the ILO bodies, and also from prevailing Nordic practice on the right to collective action.

Article 6(4) of the Charter, considered both in isolation and together with case law under it, gives rise to a significant number of questions regarding its scope and interpretation. The ECSR's first Conclusions, published in 1969–70, formulated a total of 12 general problems and interpretative positions.¹⁹ Each of these had several angles and their number has increased over the years. Despite, or perhaps precisely because of, the wide-ranging and continually developing case law under Article 6(4), no definitive analytical framework has been developed in respect of the provision. Nonetheless, we may classify the main issues as follows:

- What is 'collective action'?
- For what *purposes* may 'collective action' be employed?
This encompasses, among other things, both 'conflicts of right' and 'conflicts of interest', as well as questions relating to the 'peace obligation'.
- What *procedural* requirements may be imposed in relation to collective action?
This includes issues such as rules on mediation.

¹⁸ The Appendix clause to Article 6(4) reads: 'It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31 / Article G.' The term 'law' here is to be understood as referring not merely to statutory law, but also including case law and legal norms developed by courts. Moreover, the Appendix clause explicitly mentions only the right to strike; it is, however, unquestionable that it applies similarly to other forms of 'collective action'.

¹⁹ See European Social Charter, Committee of Independent Experts, Conclusions I, 1969–70 (Council of Europe, Strasbourg, 1970) 38–39, 183. Hereafter, CIE/ECSR Conclusions are referred to simply as 'Conclusions', the Roman digit identifying the control cycle, and (year of publication). Conclusions pertaining to the RevESC are not identified by control cycle number, and are referred to by 'Conclusions' and year of publication. Conclusions XIX-3 (2010) and Conclusions 2010 are not yet available in print (March 2011). References, thus, can only be made to the preliminary versions, country-by-country, available at the ESC website: www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/ConclusionsIndex_en.asp.

- To what extent may *limitations* (restrictions) be imposed on the right to collective action?
This question involves personal and material, as well as formal, aspects.
- What are the *consequences* of the exercise of the right to collective action?
This covers issues such as continuity of employment, entitlement to wages and liability.

It is not possible, here, to examine all the individual issues that come under each of these general headings. The following discussion aims, rather, to examine more closely a few of the central issues within the broad framework outlined above.

4. WHAT IS 'COLLECTIVE ACTION'?

4.1. ACTIONS TAKEN BY EMPLOYERS

As mentioned above, Article 6(4) of the Charter covers actions taken by employers. In its first conclusions (1969–70), the ECSR expressed the view that *lock-outs* were consequently included within the scope of the provision:

‘It is clear from the text that this provision relates to both strikes and lock-outs – even though the latter are not explicitly mentioned in the text of Article 6(4) of the Charter, or in the gloss to this provision in the Appendix. The Committee came to this conclusion because the lock-out is the principal, if not the only, form of collective action that employers can take in defence of their interests.’²⁰

Even though this view was controversial at the time, and continues to be so, it has unambiguous support in the *travaux préparatoires* to the Charter.

When the phrasing ‘the right of workers and employers to collective action’ was settled on in 1957, there was no doubt that it encompassed lock-outs. Italy filed a reservation for that particular reason (see PW Vol. IV (1957), 57, 77, 359 and 407). At the ‘Tripartite Conference’ in 1958, the employers attempted to get an explicit mention of lock-outs in the text of Article 6(4). This was opposed by the workers, which led the employers to include an explicit statement in the records in the form of a reservation to the effect that the right to lock-out must be recognised (see PW Vol. V (1958), 550–551 *cf.* 482). The issue was subsequently brought up in the Social Committee of the Committee of Ministers (CMSC) in the autumn of 1960. A German proposal to explicitly recognise lock-outs did not gain a sufficient majority at the September session of the CMSC (*cf.* Council of Europe document CE/Soc (60) 18, 4). There was agreement, however, that although the right to lock-out was not mentioned explicitly

²⁰ Conclusions I (1969–70) 38. This statement is the first item (a) of the Committee’s comprehensive interpretative enumeration.

in Article 6(4), it was inherent in the concept of 'collective action'. This was entered specifically into the records for the October session of the CMSC, with a meeting with representatives of the Parliamentary Assembly, and into the CMSC Report in December to the Committee of Ministers. This agreement was thus part of the basis of the final adoption of the text of the ESC.²¹

In 1984, the Committee stated in general terms that the right to impose a lock-out and the right to strike were *not* afforded the same degree of protection; the right to impose a lock-out should not be viewed as enjoying equally robust and wide-ranging protection as the right to strike. Among other observations, the Committee stated:

'However ... the Charter does not necessarily imply that legislation and case law should establish full legal equality between the right to strike – which the Charter indeed mentions explicitly and which is recognised as a fundamental right by the Constitution of several member States – and the right to call a lock-out.'²²

From this starting point, it is possible to envisage a number of limitations to the right to impose a lock-out beyond those that may have a basis in Article 31 of the Charter. *Inter alia*, in practice, the allowing of 'defensive' lock-outs to a limited extent, while 'offensive' lock-outs are prohibited, has been seen as compatible with Article 6(4).²³

Another question concerns lock-outs imposed by employers acting individually, i.e. employers not acting jointly either under the auspices of an employers' organisation or in some other way. In several countries, this type of lock-out is the form that predominates in practice. Some commentators have argued that a lock-out imposed by an individual employer cannot be considered as constituting a *collective* action, and accordingly cannot come within the scope of Article 6(4).²⁴ This view has no support in the *travaux préparatoires* to the Charter,²⁵ but continues to be raised in the normative jurisprudential debate. This undoubtedly has to do with the fact that such lock-outs are prohibited in a number of countries. The view has also found support in the practice of the ECSR. This was established in a case concerning Italy in 1986,²⁶ and was also stated more generally in an internal committee opinion (2004) subsequently included in the Digest of the Case Law of the European Committee of Social Rights (Digest), the published summary of the Committee's case law, which stated:

²¹ See Council of Europe document CE/Soc (60) 20, 5–6, and CE/Soc/Misc (60) 3, 19.

²² Conclusions VIII (1984) 95 (general statement of interpretation).

²³ Conclusions XV-1 Addendum (2001) 27 (Germany). This must obviously not be taken to imply that Article 6(4) does not *permit* 'offensive' lock-outs; the point being that recognition of 'offensive' lock-outs is just not required under the ESC. ECSR case law pertaining to the Scandinavian countries is, implicitly, illustrative of this point.

²⁴ D. Harris, J. Darcy (n 12) 105 n 537.

²⁵ Although the point was made and discussed (*cf.* references in n 21 *supra*).

²⁶ Conclusions IX-2 (1986) 48.

'Article 6§4 does not require recognition of the right to lock-out by an individual employer beyond exceptional circumstances.'²⁷

Although questions have been addressed to states parties in specific cases, the position of lock-outs in national law has not been pursued systematically, or with any noticeable intensity, either with regard to this point, or any other. Somewhat symptomatically, in the first examination of Article 6(4) for Azerbaijan, the ECSR merely noted the existing provisions on lock-outs and asked for information on the incidence of such collective actions (Conclusions 2010 Azerbaijan).

4.2. ACTIONS BY EMPLOYEES: STRIKE

The position is rather different with regard to the right to *strike*, which is traditionally viewed as forming the core of Article 6(4).

4.2.1. *Objective considerations*

The wording of the provision encompasses more than simply the right to strike. Other types of action taken by employees should be capable of inclusion within the concept of 'collective action', such as working to rule, go-slows, boycotts, blockades, or picketing. There is considerable variation in the extent to which the national laws of states having ratified the Charter, including Article 6, permit these various forms of collective action. In recent years, questions have been addressed to several states parties on specific matters,²⁸ but the issue has not been pursued systematically or in any detail. So far, practice under the Charter has not developed normative interpretations with regard to this aspect of the understanding of the concept of collective action and of Article 6(4).

The central issue, and the one that has attracted by far the most attention, is the right to *strike*. In the absence of any analysis of other forms of collective action, and therefore of the demarcation of a 'strike' as against other forms of collective action, a strike (*grève*) is not a clearly defined concept. But the understanding of the concept is, viewed objectively, one that corresponds to the word's fundamental meaning – a work stoppage in the sense of a complete withdrawal of labour (for a period of time).²⁹

²⁷ Digest (Council of Europe, Strasbourg, 2005) 35, cf. 2006, 68. The Digest is now published electronically on the ESC website, the latest edition being from 2008: www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestIndex_en.asp.

²⁸ E.g. Conclusions XV-1 (2000) 81 (Belgium), 121 (Cyprus). It is symptomatic that none of these issues were pursued in the subsequent control cycle (cf. Conclusions XVI-1 (2002) 69–71 and 103). See, further, Conclusions XV-1 (2000) 202 (Finland), where the Committee in the next cycle just took note of the information in the Finnish report on domestic law and legal writing (cf. Conclusions XVI-1 (2002) 208).

²⁹ This holds true even if the term *grève* is used in a wider sense in French law, also including 'work to rule' (*grève du zèle*) and 'go-slow' (*grève perlée*).

4.2.2. Lawful aims

The subjective aspects of the concept of strike or 'collective action' have been far more central to the interpretation of Article 6(4) and case law under it than the objective aspects (the forms of action). The issue here is not the understanding of the concept *in abstracto*, but what aims should be regarded as falling within the scope of the concept as employed in Article 6(4). The fundamental question is, what types of aims should be viewed as forming a legitimate basis for collective action in order for the right to strike to be considered to enjoy, pursuant to Article 6(4), adequate protection in national law?

The basic starting point was formulated in the ECSR's first Conclusions, in which the Committee stated (at item b):

'This provision recognises the right to collective action *only* in cases of conflicts of *interest*. It follows that it *cannot* be invoked in cases of conflicts of *right*, i.e., in particular, in cases of disputes concerning the existence, validity or interpretation of a collective agreement or *its violation*, e.g., through action taken *during* its currency with a view to the *revision* of its contents.'³⁰

At the same time, the Committee pointed out that national law could legitimately prohibit collective action in such cases, even where the parties to a collective agreement were willing to agree a wider legitimate basis for collective action.³¹

Accordingly, the Committee drew a distinction here – between *conflicts of right* and *conflicts of interest* – that was to be of decisive significance to the scope of the protection of the right to 'collective action' under Article 6(4). This distinction has given rise to a number of problems.

By way of introduction, we should highlight two issues that are both connected to the wider question of the aims of the collective action.

The first is that a collective action that aims to revise (amend) a collective agreement is viewed as being taken in pursuance of a conflict of right, and, as such, is *not* covered by the right to strike protected by Article 6(4). This point of view has come under pressure and has been the subject of much debate. It may seem that a dispute over the revision of a collective agreement can easily be claimed to involve a conflict of interest (over the contents of the agreement). The banality of such an immediate response, however, quickly becomes apparent. Conflicts of interest are present under the surface in all disputes, but some such conflicts are capable of transformation into conflicts of right. This is a conventional point of view. It is also obviously the view upon which the ECSR's position was based. The understanding of the nature of a conflict of right is associated particularly (but not exclusively) with collective agreements

³⁰ Conclusions I (1969–70) 38 (my emphasis).

³¹ *Ibid.* the final sentence of the paragraph states: 'This interpretation should be adopted even where a collective agreement contains provisions purporting to permit such industrial action.'

already entered into. This view is to some extent based on the collective agreement's function (or potential function) as a legally binding contract, which implies that international law (in the form of the Charter) does not grant a right to seek resolution of disputes in relation to the contract while it is in force through collective action.³² It is indicative that the Committee's statement relates to disputes over the revision of a collective agreement '*during its currency*', and that taking collective action in such circumstances is viewed as a breach ('violation') of the agreement. From a Germano-Nordic perspective, this is a familiar point of view, even though it may seem alien, to varying degrees, in other European countries.

The second issue, which is related to the first, concerns the so-called *peace obligation*.³³ The ECSR did not use this expression in its first Conclusions (and a very long time was to pass before it did come to be used in the Committee's practice), but the Committee's statement of interpretation in fact expressed precisely the thinking that lies at the core of the concept of the 'peace obligation', as it is understood in both Scandinavian and German labour law.

4.2.3. *The peace obligation in more detail*

It was hardly coincidental that the Committee expressed such views in its statement of interpretation. Four of the seven states that had, at that time, ratified the Charter, and whose compliance was monitored during the first supervision cycle, were 'peace obligation states',³⁴ i.e. the three Scandinavian states and Germany. In all these countries, a peace obligation pursuant to a collective agreement is recognised as a central legal concept, applied through contractual regulation and case law (including case law on 'silent clauses'). In some of these countries (Norway and Sweden), the peace obligation is also regulated by statute. The Committee was, of course, well aware of this situation, both in 1968–70, and subsequently. This is clear simply from the membership of the Committee, as some of its members would have been extremely familiar with the regulation of peace obligations and the differences between rights to collective action in different European countries.³⁵ There was also a striking parallel

³² It does not follow that the ESC and its Article 6(4) preclude domestic law from also allowing collective action in such cases. The point of importance is that domestic law is *not required* to do so, i.e. it is not precluded from prohibiting the use of collective action as a means in rights disputes of this kind.

³³ E.g. also '*obligation de la paix*', or '*Friedenspflicht*'.

³⁴ The first control cycle (Conclusions I) was subdivided into two parts. The first covered Denmark, Norway and Sweden, plus Italy and the UK; the second dealt with Germany and Ireland.

³⁵ From the outset, the ECSR was composed of seven members, among them one French, one German, and one Norwegian. The member from the UK was Sir Otto Kahn-Freund, probably the most renowned comparative labour lawyer in Europe at the time. The Norwegian member was Brynjulf Bull, who had been, since 1956, President of the National Labour Court, a specialised court for collective labour law matters. Moreover, Nicolas Valticos attended the Committee as an observer for the ILO. Kahn-Freund stepped down from the Committee after one mandate, in 1972, but he wrote an expert study on the right to strike for the Council of Europe a short time thereafter.

between the basic interpretation of Article 6(4) formulated by the Committee in its first Conclusions and the well established (legislative) regulation of the peace obligation that existed in different national laws.

This may be illustrated by comparing the Committee's comments with the treatment of the 'peace obligation' in the Norwegian Labour Disputes Act 1927, ((LDA) section 6(1) and (3)).³⁶ The provisions are worded as follows (my italics):

1. Recourse shall not be had to strike, lockout or other industrial action to settle a dispute respecting the *validity, interpretation or existence* of a collective agreement or claims based on a collective agreement.

2. ...

3. Recourse shall not be had to strike, lockout or other industrial action to settle a dispute between a trade union and an employer or an employers' association respecting the regulation of terms of employment or wages or other matters relating to employment which are not covered by a collective agreement, until the time-limits fixed in §§29 and 36 have expired. If the dispute relates to the conclusion of a collective agreement *to supersede* a previous collective agreement the period of validity must also have expired.'

The basic position established by the ECSR's interpretation of Article 6(4) on this point, in its Conclusions I, remained untouched in practice until the – apparently abrupt – developments of 2002.³⁷ At this point the Committee expressed a rather different view, finding that the situation in Norway, and also in Denmark, Germany and Malta, was in breach of Article 6(4) because of provisions in national law concerning the peace obligation.³⁸ The considerations underlying the Committee's position came clearly into view in its Conclusions concerning Denmark, where it stated that:

'... the conclusion of a collective agreement usually makes it illegal to initiate collective action *during its period of validity*, i.e. a peace obligation applies ... This peace obligation is not always expressly mentioned in the collective agreements, but it follows from the constant case law of the Labour Court that it is considered to be an unwritten clause of such agreements', and

(O. Kahn-Freund, *The Right to Strike: Its scope and limitations* (Council of Europe, Strasbourg, 1975)). Bull stayed on as a member until 1990.

³⁶ Act of 5 May 1927 No. 1 on Labour Disputes. Its section 6(1) and (3) correspond fully to section 6(1) and (2) of the first Labour Disputes Act of 6 August 1915. At the time of the ECSR's first control cycle, the Act (1928:253) on Collective Agreements (KAL) was in force in Sweden. KAL section 4 (Nos 1 – 3) corresponded closely to the Norwegian LDA section 6, as does section 41 of the superseding Act (1976:580) on Joint Determination in Working Life (MBL).

³⁷ We use the term 'apparently' as internally in the Committee the issue had been a matter of discussion for some time – approximately five years.

³⁸ The Committee also reached a negative conclusion for Sweden, but on a different ground, and did not address the peace obligation rules (an explanation lies, in part, in the chronology, cf. the dissenting opinion referred to in n 40, *infra*) (cf. Conclusions 2002, 236–237). Somewhat the same was the case for Iceland (see Conclusions XVI-1 (2002) 333–338). For Finland, the Committee went no further than to ask questions (cf. *ibid.*, 202–206).

'The Committee considers that under the Charter a *peace obligation must not be imposed by statute or by case law*, but should be *stipulated* by the parties to the agreement themselves. The only cases where this principle may be deviated from are those foreseen by Article 31 of the Charter.'³⁹

The position set out here is a multifaceted norm. Firstly, it shall not be permissible (i.e. it is a breach of Article 6(4)) to establish rules concerning the peace obligation that impose statutory restrictions on the recourse to collective action (strike). Secondly, nor shall the courts be able to impose a peace obligation as a legal effect of a collective agreement, either through interpretation, or through the insertion of implied terms into a collective agreement on the basis of the court's understanding of considerations, such as the nature of the contract, the assumptions underlying it, *etc.* Thirdly, and even more clearly, if a peace obligation is to be imposed by a collective agreement, it must be 'stipulated by the parties ... themselves'. This implies a requirement that any provisions regarding a peace obligation must be expressly included in the collective agreement itself.

The Committee's adoption of this position entailed an abrupt and extremely significant change in the understanding and application of Article 6(4).⁴⁰ Questions had, of course, been raised over the years about individual issues concerning many countries' rules on collective action and the peace obligation. In 2002, however, the Committee's position underwent a fundamental change. This meant, *inter alia*, that the national regimes in the Nordic countries, Germany, and also Malta, were suddenly viewed as violating Article 6(4), even though these regimes had, since the ratification of the Charter, and for nearly 35 years subsequently, been viewed as conforming with the Charter's requirements regarding protection of the right to collective action.

The position thus adopted by the Committee in 2002 was itself amended as early as the next supervision cycle, in 2004. Once again the change was significant, and it went a long way towards returning to the Committee's initial position. It was now accepted that rules on a peace obligation might be imposed by statute, and also that the courts might imply the existence of a peace obligation, even in the absence of explicit wording in the collective agreement itself. The innovative element of the Committee's stance in 2004 took the form of a kind of assumption that peace obligation regimes express the actual wishes and will of the social partners in the labour market.⁴¹ These

³⁹ Conclusions XV-1 (2002) 177 (my italics). The normative formula, i.e. the second part of the quotation above, appeared identically in the Conclusions for Norway (*ibid.* 496), for Malta (416) and Germany (248).

⁴⁰ The ECSR Vice-President at the time, Mr Evju (Norway), joined by Mr Birk (Germany) and Mr Grillberger (Austria), dissented on this ground (see Conclusions XVI-1 (2002) 188–189; 267–269; 426–427; 514–515). The turnaround in case law is illustrated also by the Committee's Conclusion for Denmark in the preceding control cycle. The description of the situation in domestic law was precisely the same, but the Committee did not reach a negative Conclusion and gave no indication whatsoever in that direction (*cf.* Conclusions XV-1 (2000) 152).

⁴¹ They should 'reflect the certain will of social partners', or similar formulations.

new normative viewpoints were clearly expressed in the Committee's Conclusions concerning Norway and Denmark. The change is particularly apparent in the Conclusion for Norway, which stated:

'The Committee reconsiders the question of peace obligation. It recalls that, in the Norwegian system of industrial relations, collective agreements are seen as a social peace treaty of fixed duration during which strikes are prohibited. The peace obligation is a contractual obligation and it is imposed by statute law. It is also relative since it applies to disputes concerning the existence, validity, interpretation and application of a collective agreement, as well as to disputes pertaining to claims based on the agreement. It also applies to matters regulated and sought to be regulated by collective agreement... Taking into consideration all aspects of the Norwegian system, in particular that the peace obligation *reflects the certain will of social partners* ... the Committee considers that the system is in conformity with Article 6§4 of the Revised Charter.'⁴²

The Conclusion for Denmark stated that: 'Taking into account that this peace obligation reflects a deliberate decision taken by the social partners in the distant past and that the majority of collective agreements today include an express peace clause, the Committee considers that the peace obligation in Danish law reflects the certain will of the social partners and that the situation is in conformity with Article 6(4) of the Charter.'⁴³

A turnaround as it was, the new stance of 2004 has the clear ring of a compromise about it. Moving from the rigid idea that a peace obligation could only be accepted if expressly 'stipulated by the parties ... themselves' in the individual collective agreement, the new formula of 'the peace obligation reflects the certain will of the social partners' maintains a central role for the collective actors in the labour market, but is sufficiently plastic to facilitate a more comprehensive assessment. In that, it may also be regarded as an attempt to establish a normative understanding that would enable fundamentally different legal regimes – such as those existing in Europe in this area of the law – to be accepted under Article 6(4).⁴⁴ It may also be characterised as a compromise that avoids the need to address specifically problematic areas in the

⁴² Conclusions 2004, 404–405 (my emphasis).

⁴³ Conclusions XVII-1 (2004) 131. This was stated similarly, but more cursorily, with regard to Germany (*ibid.*, 204–205). For Malta, the revised normative position resulted in a question (*ibid.*, 290). The issue was not addressed in respect of Finland or Sweden, for which other issues were focused on, and the Conclusions were arrived at on such a basis (see Conclusions XVII-1 (2004) 169–170 (Finland) and Conclusions 2004, 565–566 (Sweden)). Iceland had failed to submit a national report and hence, no conclusions were made (*cf.* Conclusions XVII-1 (2004) 265–267).

⁴⁴ The changes from 2002 to 2004 can safely be seen as reflecting changing views within the Committee. There were only minor changes in membership. By 2002 the Committee consisted of 12 members, in 2004 the number of members was 13 and just one member sitting in 2002 had been replaced. On the decision (in 2001) to increase the number of members of the Committee from nine, as applying since 1994, and subsequent implementations, see *European Social Charter, Collected texts*, 6th ed. (updated to 30 June 2008), available at www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ESCCollectedTexts_en.pdf, at 197–204.

relationship between states' national case law and Article 31 of the Charter. As noted above, however, the interpretative position now established goes a long way towards returning to the basic starting point established in 1969–70. The 2004 stance was maintained in the 2006 control cycle,⁴⁵ and also subsequently in 2010, the last control cycle to date dealing with Article 6(4).⁴⁶

The process has, however, introduced some new elements into the Committee's practice. One is a requirement that the peace obligation must be regulated to reflect 'the certain will of the social partners'. As practice under the Charter has demonstrated, this requirement is not in itself problematic for states with long legal traditions in this area, such as the Nordic countries. But there is still uncertainty regarding the more detailed implications of the requirement and how it should be applied to new or amended legal regimes. This area has still not been systematically addressed or developed in the Committee's practice. The same applies to the basic concept of a 'peace obligation'. There is no doubt that there is agreement as to the core principles of the concept. The scope in more detail of the concept is unclear, however, as is the demarcation of the concept in relation to other considerations affecting restrictions on, and the regulation of, the right to collective action. Demarcation related issues concern the type of *aims* that should be considered as falling within the scope of the right to collective action pursuant to Article 6(4),⁴⁷ as well as other considerations.

5. RESTRICTIONS TO THE RIGHT TO COLLECTIVE ACTION

For the purposes of the following discussion it is crucial to distinguish between the different possible bases for a right to collective action. According to Article 6(4), and the gloss to the provision in the Appendix, restrictions to a right to collective action, which would otherwise be protected by Article 6(4), may follow from a collective

⁴⁵ See, explicitly, Conclusions XVIII-1 (2006) 521–522 (Malta), and implicitly *ibid.*, 271 and 306–307 (Denmark, Germany), Conclusions 2006, 248, 627 and 865 (Finland, Norway, and Sweden respectively).

⁴⁶ Article 6 belongs in 'Group 3' of the current system of supervision of national reports, and was thus a part of the 'Labour Rights' monitored in 2010, for the reference period 2005–2008, this being the first control cycle after 2006 to examine Article 6. For the relevant individual conclusions, see Conclusions XIX-3 (2010) Denmark, Conclusions 2010 Malta, Norway, all implicitly by referring to previous examinations.

⁴⁷ There is no established case law or any specific requirement to the effect that national law must permit *sympathy* for (or *solidarity* with) collective action. On the other hand, it was stated early on that 'political strikes' (not a very clear concept in any way) are not protected by Article 6(4), the underlying point of view being that Article 6 is 'designed to "protect the right to bargain collectively"' and 'political strikes' are 'obviously quite outside the purview of collective bargaining' (Conclusions C II (1971) 27). There is certainly a tension between this view and the conception of 'collective bargaining' the Committee has otherwise relied on (*cf. infra*).

agreement or from legislation *etc.* that comes within the framework laid down by Article 31 (Article G RevESC). This gives rise to a number of problems.

5.1. THE CONCEPT OF A CONFLICT OF INTEREST

An initial question concerns the meaning of 'conflict of interest' within the scope of Article 6(4). The ECSR's general statement of interpretation of 1969–70 established some constraints with respect to disputes relating to collective agreements. These are not exhaustive, however. Since its earliest days, the Committee has set up a broader canvas. The general principle, which is firmly established, is that regulation that causes the right to strike to be limited to a right to strike aimed at concluding a collective agreement is *not* in conformity with the Charter.⁴⁸

This position is consistent with the Committee's notion of the concept of 'collective bargaining'. The Committee has insisted that this term does not only encompass the negotiation of collective agreements, but has a wider frame of reference. Many situations other than contractual negotiations may be described as 'collective bargaining'. For example, a strike that aims to force an employer to comply with statutory safety rules will not fall outside the scope of Article 6(4), and the term 'collective bargaining' may also be used if a business is considering, or has implemented, redundancies and a group of employees is trying either to prevent the redundancies, or to have the redundant workers reinstated.⁴⁹ The broad interpretation of 'collective bargaining' in the context of Article 6(4), on which the Committee's case law has been founded, is summarised in the Committee's Conclusions of 1975:

'Any bargaining between one or more employers and a body of employees (whether 'de jure' or 'de facto') aimed at solving a problem of common interest, whatever its nature may be, should be regarded as 'collective bargaining' within the meaning of Article 6.'⁵⁰

This basic position has been maintained fairly consistently in the Committee's case law under Article 6(4) (but not under the other paragraphs of Article 6). One result has been that Germany has consistently been found in breach of Article 6(4), again maintained in 2010, on the grounds that strikes not concerned with the conclusion of collective agreements are unlawful.⁵¹ More recently, the Committee reached a negative Conclusion under Article 6(4) concerning Finland, because Finnish law was

⁴⁸ Cf. Conclusions II (1971) 28: '... provisions are not consonant with the Charter when they are designed to restrict the right to strike solely to strikes to secure the conclusion of collective agreements ...' This statement elucidates the stance adopted in respect of Germany in the Committee's first Conclusions, where questions were raised on this ground (cf. Conclusions I (1969–70) 183–184).

⁴⁹ See Conclusions II (1971) 28 (Germany) and Conclusions IV (1975) 50 (also Germany).

⁵⁰ Conclusions IV (1975) 50.

⁵¹ See Conclusions I (1969–70) 184, Conclusions II (1971) 28, and the most recent being Conclusions XVIII-1 (2006) 307–309 and Conclusions XIX-3 (2010) Germany.

seen as barring civil servants and local government employees from strike action in pursuit of aims other than those that may be addressed by a collective agreement.⁵²

The relationship between this construction of the notion of 'collective bargaining' and rules regulating the right to collective action, pursuant to collective agreements, has never been explicitly debated, but the starting point must be that the interpretation is relevant to what restrictions may – or may not – follow from statute (or case law), but *not* to whatever may be agreed in a collective agreement. This is connected to, and is consistent with, the next question considered below.

5.2. RESTRICTIONS RESULTING FROM COLLECTIVE AGREEMENTS

This section discusses the relationship between the proviso in Article 6(4) concerning 'collective agreements previously entered into' and the constraints on state intervention laid down in Article 31 (Article G RevESC). Our starting point here is that there are two separate bases for possible restrictions on the right to collective action. The ECSR addressed the 'internal' relationship within Article 6(4) in its general statement of interpretation of 1969–70, which stated that restrictions on lawful recourse to collective action may follow from a collective agreement, even though such restrictions would otherwise violate Article 6(4). The Committee's first conclusions stated:

'It follows from the wording of the Charter that restrictions on recourse to collective action even in cases of conflicts of interest are compatible with the Charter, if they are imposed by a collective agreement.'⁵³

From this it follows that the same must apply in relation to Article 31. As the gloss in the Appendix clearly indicates,⁵⁴ Article 31 addresses the extent to which states may restrict the availability of collective action beyond the constraints or starting points that would otherwise follow from Article 6(4). Neither in the *travaux préparatoires* to the Charter, nor in the case law of the supervisory bodies, is there any basis for concluding that Article 31 should be applied to restrict the competence of the social partners to enter into collective agreements. Restrictions that result from a collective

⁵² Conclusions XVI-1 (2002) 209–210, Conclusions XVII-1 (2004) 169–170, and the most recent being Conclusions 2006, 248–249. The Finnish Acts concerned are those on state sector and local government collective agreements, Lag om statens tjänstekollektivavtal 6.11.1970/664, section 8; and Lag om kommunala tjänstekollektivavtal 6.11.1970/669, section 8, respectively. Albeit that the Committee's initial description of the situation in Finnish law is adequate, in Conclusions XV-1 (2000) 202–203, the Committee's wording of its conclusions is not appropriate when stating that 'civil servants cannot call strikes in pursuance of objectives which are not covered by a collective agreement' (my emphasis). This formulation is rather a *contradictio in adjecto*, and should be considered a slip-up and a working mishap. – Finland did not submit a report for the 2010 control cycle, and thus there are no Conclusions from that cycle in respect of Finland.

⁵³ Conclusions I (1969–70) 38, item c.

⁵⁴ Cf. *supra* at n 18.

agreement may, however, apply *per se* only to the parties bound by the collective agreement.⁵⁵

5.3. RESTRICTIONS FOLLOWING FROM ARTICLE 31

Restrictions of various types may be founded on Article 31 of the Charter. Here we will consider the main categories of restrictions in brief.

Restrictions may be refer to categories of *personnel*, i.e. the right to collective action may be limited or excluded in respect of certain categories of workers, such as military personnel, police, judges, or other public sector employees in senior positions ('senior civil servants'). Restrictions in relation to such groups have been accepted, and there is a comprehensive body of case law addressing this issue and the demarcation of this category of restrictions.⁵⁶

Other restrictions may be *material* in nature,⁵⁷ and may, in turn, be classified in different ways. For example, a material restriction may relate to the nature of the work or final product. 'Essential services' is a familiar description, which may also be found in cases brought under Article 6(4) with reference to Article 31. In the context of the Charter, however, the term 'essential services' has little legal clarity. The notion appears in the general interpretative statements in the ECSR's first Conclusions, where it was stated that restrictions for 'essential public services' may be compatible with Article 6(4) *cf.* Article 31, but whether that is the case will depend on a closer assessment of the individual case.⁵⁸ Subsequently, the notion appears, in some cases, as a reason for accepting or excluding a restriction, but the concept has not been given much consideration or been analysed in a systematic manner.

Material restrictions may also take the form of procedural rules regulating the exercise or implementation of collective action, as well as other forms of state intervention. Some of the above remarks are also relevant to these types of restrictions. We will return to some aspects of these questions below.

⁵⁵ Similarly, D. Harris, J. Darcy (n 12) 106; P. Herzfeld Olsson, *Facklig föreningsfrihet som mänsklig rättighet* (Iustus Förlag, Uppsala, 2003) 284; *cf.* T. Novitz (n 12) 284. A different question, also touched upon by these authors, is whether restrictions ensuing from a collective agreement may encompass only issues that *are* regulated by the agreement. On this point, opinions differ, in legal writing as well as in case law, but at present, there is no basis on which to assume strict limitations.

⁵⁶ E.g. D. Harris, J. Darcy (n 12) 111–112; and L. Samuel, *Fundamental social rights: Case law of the European Social Charter*, 2nd ed. (Council of Europe Publishing, Strasbourg, 2002) 155–159.

⁵⁷ There is, obviously, no sharp demarcation between 'personal' or 'material' restrictions, or between categories of 'material' restriction. E.g., restrictions pertaining to public sector employees might well be termed 'material', in that they are linked to the work being performed, as 'essential services'. The point here is just to give an overview referring to main issues that can be gleaned from ECSR case law.

⁵⁸ *Cf.* Conclusions I (1969–70) 38, item f.

6. AN INDIVIDUAL OR A COLLECTIVE RIGHT – WHO MAY CALL A STRIKE?

Firstly we consider the question of who has the right to strike and who is capable of exercising the right. Who are the beneficiaries of the rights granted by Article 6(4) of the Charter?

This issue relates to the fundamental question of whether the right to strike is individual or collective in nature: is the right to strike a right that is enjoyed by individuals or by trade unions, or possibly by both? As *Kahn-Freund* remarked in his time, the views of the Member States of the European Council are divided on this question.⁵⁹ This is still true today. Where the right to strike (or to collective action) is effectively viewed as a remedy in the context of contractual negotiations and collective agreements, it is typically seen as collective in nature. In contrast, where the right to strike is not, or is not exclusively, linked to the negotiation and implementation of collective agreements, it tends to be seen as an individual right.

Right from the start, the ECSR has operated on the assumption that the right to strike, pursuant to Article 6(4), is a form of individual right. The fundamental counterpoint is that the right to vote on and call a strike cannot be a monopoly of trade unions or be dependent on unions' actions and/or consent *etc.* This view was first clearly expressed in respect of Germany, when the Committee, in 1971, stated that making the exercise of the right to strike 'dependent on trade union action' was not in conformity with the Charter.⁶⁰ The Committee's subsequent case law has consistently adhered to this initial position.

We may interject here that the wording of Article 6(4) does not distinguish between actions by employers and actions by employees. The word used in both cases is the plural form of the word for an individual – 'workers and employers'. As a result, it may seem paradoxical that the right to strike, according to Article 6(4), is an individual right for employees, but that a right for individual employers to impose a lock-out is not granted protection (other than in exceptional circumstances) (*cf. supra* at n 17-20). No doubt there are some interpretative views and opinions that have not surfaced on this point; the Committee's published case law does not give any convincing explanation for the disparity.

There are sound reasons for maintaining that the right to collective action should be an individual right, in the sense that an *individual* should enjoy protection if the right is exercised, i.e. if a lock-out or a strike is imposed and an individual participates in such an action. Which parties should be capable of *calling* a strike is, however, a completely *different* question. It would be misconceived to view the distinction

⁵⁹ O. Kahn-Freund (n 35) 5.

⁶⁰ Conclusions II (1971) 28. The statement was, in fact, made in conjunction with the Committee's statement that the right to collective action cannot be restricted to disputes aimed at the conclusion of a collective agreement, as a second side of the coin. In later case law the two facets have nonetheless been treated as separate and independent.

between individual and collective rights as giving rise to a dichotomy that would make individual rights only capable of being exercised by individuals, or that would leave individuals unprotected if the right to collective action could only be exercised by a trade union.

Early on in its practice, however, the ECSR established that independence from the actions of a trade union also meant that the right to strike, including calling a strike, extends to employees neither associated with a trade union nor holding any formal position – ‘an ordinary group of workers without any legal status’. This was because such a group would also be entitled to engage in ‘collective bargaining’,⁶¹ since this right is not exclusive to trade unions either.⁶²

This position was developed further in 2000. Having addressed questions to individual states two years earlier,⁶³ the ECSR upheld the principle in general, but also supplemented it with a modification. Reserving the right to call a strike to trade unions may, nevertheless, be in conformity with Article 6(4) *if* employees may easily, and without too many formalities, *etc.*, establish a trade union for the purposes of being able to strike.⁶⁴ On this basis, the Committee reached positive Conclusions in respect of, among others, Sweden.⁶⁵

Just two years later, this position was reversed. The pendulum effect here corresponds to that observed above in relation to peace obligations.⁶⁶ In 2002, the Committee tersely stated that: ‘any collectivity of workers, including an ordinary group of workers without any legal status, should be given the right to strike under Article 6§4.’⁶⁷ As a result, the Committee reached negative Conclusions in respect of, among others, Finland and Sweden.⁶⁸ A detailed examination of the Committee’s Conclusions of 2002 reveals that although the new interpretative position was applied broadly, its application was not, in all respects, consistent and closely reasoned.⁶⁹ In

⁶¹ Cf. Conclusions IV (1975) 50 (Germany).

⁶² It is a different matter that the right to bargain collectively and to conclude collective agreements may be restricted to trade unions, or certain trade unions, on the basis of criteria of ‘representativeness’ *etc.* Here, the ECSR’s broad notion of ‘collective bargaining’ (*cf. supra* at n 49–52) must be kept in mind.

⁶³ Finland and Sweden in particular, see Conclusions XIV-1 (1998) 220–221 and 736.

⁶⁴ I.e. ‘reserving the right to call a strike for trade unions may be compatible with the Charter if workers may easily and without undue requirements or formalities, form a trade union for the purpose of a strike’ (*cf.* Conclusions XV-1 (2000) 566 (Sweden)).

⁶⁵ *Ibid.* A question was again put to Finland, and also to Portugal, which had received a negative Conclusions two years previously (*cf. ibid.*, 203–204 and 478). The Conclusions for Germany remained negative, on the other hand, on the ground that requirements to establish a relevant trade union were considered too onerous (*cf.* Conclusions XV-1 Addendum (2001) 28–29).

⁶⁶ See *supra* at n 40–46.

⁶⁷ Conclusions 2002, 236 (Sweden), and similarly, Conclusions XVI-1 (2002) 210 (Finland).

⁶⁸ Here, too, Mr. Evju, joined by Mr. Birk and Mr. Grillberger, dissented (see Conclusions 2002, 264).

⁶⁹ E.g. Conclusions XVI-1 (2002) 578; the negative conclusion for Portugal was not based on there being a trade union monopoly, but on the ground that setting up a relevant trade union would take too long. This Conclusion still stands in Conclusions 2010 Portugal.

2004, the Committee pretty much performed a U-turn, but in doing so, highlighted the distinction between calling and participating in a strike. The main reasons for the change in the Committee's position were expressed most clearly in its (now *positive*) Conclusion concerning Sweden, where it held that:

The Committee refers to its negative conclusion of 2002 and further states: 'However it has decided to *re-examine* the situation. It considers that the reference to 'workers' in Article 6§4 relates to those who are *entitled to take part* in collective action but says nothing about those *empowered to call a strike*. In other words, this provision does *not* require states to grant any group of workers authority to call a strike but leaves them the option of deciding which groups shall have this right and thus of restricting the right to call strikes to trade unions. However such restrictions are only compatible with Article 6§4 if there is complete *freedom to form* trade unions *and* the process is not subject to excessive formalities that would impede the rapid decisions that strike action sometimes requires.'⁷⁰

Given the background to this statement, opinions would clearly have been divided among members of the Committee on adopting this position. So far, however, it has continued to prevail, and has formed the point of departure for the Committee's reasoning in the subsequent supervision cycles for Article 6(4), in 2006 and 2010.⁷¹ The solution adopted in 2004 may, however, be seen as a form of compromise. It also came with an *addendum*: employees who are not members of the relevant trade union must be entitled to *participate* in the strike, and in this respect, must enjoy the *same protection* as the other workers (the members of the trade union). Accordingly, in its Conclusions concerning Norway, the Committee maintained, as the basis for its consideration of a question concerning national law:

'States must ensure that workers who are not members of the trade union having called a strike have the right to *participate* in the strike and, in that case, enjoy the *same protection* as the others.'⁷²

This statement may seem clear enough. Its implications, however, are less so. Apparently the right to participate in a strike applies to anyone who is not a member of the union that has resolved to call a strike, i.e. employees who are not members of any union, as well as members of other unions. Whether this principle should apply unconditionally, or whether its application is restricted, however, remains uncertain. The question of what procedural requirements may be imposed (with regard to matters such as the

⁷⁰ Conclusions 2004, 565–566; my italics.

⁷¹ E.g. Conclusions 2006, 248–249 (Finland), where the text of the Conclusion for Sweden from 2004 is repeated literally verbally, and the Conclusion is positive after having been deferred with questions in 2004 on the basis of the new interpretative stance then adopted (cf. Conclusions XVII-1 (2004) 170). See, further, e.g., Conclusions XIX-3 (2010) Croatia, Germany, Latvia, and Conclusions 2010 Armenia, Azerbaijan, France, Georgia, Portugal, and Ukraine.

⁷² Conclusions 2004, 405 (my italics). On the issue of who can call a strike, the Conclusions for Norway have always been positive.

giving of notice, the form of any such notice, and the time limits for serving notice on the employer) is also left rather open. This 'declaration of principle' of 2004 has not so far been systematically followed up and developed further in practice, although it has been restated in context in some cases.⁷³

Defining the right to (participate in a) strike as an individual right implies a requirement that strike action shall not cause the termination of employment. This view was clearly formulated in the Committee's initial general statements of interpretation,⁷⁴ and has continued to prevail. The Norwegian model, in which collective action, formally speaking, involves the termination of employment, was accepted on the basis of information that legitimate collective action, in practice, only involved a suspension of employment.⁷⁵ This question, which has been debated in national law, was taken up again by the Committee in 1988, on the basis of more recent information, but the Committee upheld its previous positive evaluation on this point two years later, on the basis of further information contained in a report submitted by Norway.⁷⁶ The Committee concluded otherwise, however, in respect of Denmark. Following the Committee's initial 'conditionally' positive evaluation,⁷⁷ the question lay dormant for practical purposes for many years, only to be taken up again after the Committee addressed questions to Denmark in 1998 on its national practice.⁷⁸ On the basis of information that was eventually supplied by Denmark, the Committee concluded, in 2004, that Danish law on this point was in breach of Article 6(4). Revisiting the issue in 2010, the Committee, on the basis of new information in the Danish report, reached a positive Conclusion.⁷⁹

As an individual right, according to the ESCR's practice, the right to strike is made up of several other aspects, such as the right to be protected against dismissals and reprisals (including protection for striking workers from being replaced by others ('strike breakers', 'replacements')); the right to be protected against loss of, or

⁷³ As regards Norway, the Committee, in 2006, stopped at some rather cursory observations on the situation in law, not adding any comments of its own (*cf.* Conclusions 2006, 628–629). For, e.g., Finland and Sweden – which illustrate the general approach here – the issue was not addressed at all (*cf. ibid.*, 248–249 and 865). In Conclusions 2010 Armenia, the Committee 'recalled' its opinion that 'any worker concerned [irrespective of trade union membership] has the right to participate in the strike'. The same statement appears in Conclusions 2010 Azerbaijan, Georgia, *cf.* also Conclusions XIX-3 Denmark, whereas no comments were made in Conclusions 2010 Sweden.

⁷⁴ Conclusions I (1969–70) 39, item i.

⁷⁵ Conclusions II (1971) 29, *cf.* Conclusions I (1969–70) 39 and 125.

⁷⁶ Conclusions XIV-1 (1998) 619–620, and Conclusions XV-1 (2000) 437.

⁷⁷ Conclusions II (1971) 28, *cf.* Conclusions I (1969–70) 39.

⁷⁸ Conclusions XIV-1 (1998) 181, reiterated in Conclusions XV-1 (2000) 156 and Conclusions XVI-1 (2002) 177.

⁷⁹ Conclusions XVII-1 (2004) 133–134, and similarly Conclusions XVIII-1 (2006) 273, and further, 29th National Report on the implementation of the European Social Charter submitted by the Government of Denmark (Articles 2, 4, 5 and 6 of the European Social Charter and Articles 2 and 3 of the Additional Protocol for the period 01/01/2005 – 31/12/2008) and Conclusions XIX-3 (2010) Denmark.

deductions from, wages for longer than the actual duration of the collective action; and the right to be protected against civil or criminal liability arising from legitimate collective action. The latter right also applies to trade unions. An examination of all these issues is beyond the scope of our discussion here.⁸⁰

7. REGULATION AND RESTRICTIONS

7.1. PROCEDURAL RULES AND MEDIATION

It is quite ordinary, although not universally the case, that certain requirements, *etc.*, of a procedural nature apply, which must be complied with if collective action is to be carried out. In its first Conclusions, the ECSR also stated that 'cooling-off periods' are not incompatible with Article 6(4):

This applies to 'a 'cooling-off' period prescribed by *legislation*, for periods of negotiation or conciliation or arbitration proceedings between employers and workers; the Committee is of the opinion that such a provision *does not impose a real restriction* of the right to collective action, since it merely *regulates the exercise* thereof'.⁸¹

At first sight, the distinction made here by the Committee might seem startling. Procedural rules also restrict the freedom to take collective action; they limit the opportunity to take spontaneous and immediate action. It was precisely the Committee's intention, however, to indicate a distinction between regulation and restriction, with Article 31 of the Charter setting the boundaries on the competence of the state to intervene. The gloss in the Appendix to Article 6(4) was adopted to clarify this, particularly with regard to the right to strike.⁸² Particular attention was devoted to this issue during the Charter's final preparatory phase. The legislation of some states provided that collective action cannot lawfully be initiated before measures such as mediation had been attempted. A special survey was undertaken to establish the prevalence of such rules,⁸³ and subsequent work was aimed at ensuring that such provisions would not be *per se* in breach of the Charter. For example, some states, including France, insisted that it should be made absolutely clear that states' right to regulate the exercise of the right to strike was not affected.⁸⁴

Practice under Article 6(4) has followed the lines established in the *travaux préparatoires* to the Charter and the ECSR's initial statement of interpretation. The

⁸⁰ See, further, e.g., D. Harris, J. Darcy (n 12) 109–111, and L. Samuel (n 56) 161–167.

⁸¹ Conclusions I (1969–70) 38, item d.

⁸² Cf. D. Harris, J. Darcy (n 12) 106–107 with n 553.

⁸³ See Council of Europe document CE/Soc (60) 17 (7th September 1960).

⁸⁴ Cf. the French Memorandum CE/Soc (60) 29 (5th December 1960), 5: 'The text must make it absolutely clear that the right of each State to lay down regulations governing the exercise of the right to strike is not affected.'

exact meaning of 'cooling-off period' is admittedly uncertain, but case law suggests it covers three types of rules.

Rules of the first type lay down the procedures required for arriving at a lawful resolution to call (give notice of) a strike (or other form of collective action). A state is permitted to legislate to establish how employees, employers and their respective unions/organisations should proceed when adopting such resolutions. The form of rules that has been at issue in case law has been rules regulating *ballots*. These require those involved in collective action to be balloted, may regulate how ballots should be organised, and may establish the required quorum and majority to pass a resolution in favour of collective action. Such rules are acceptable, in principle, under the Charter, for example, the requirement of minimum 20 per cent participation and a simple majority of votes cast, stipulated in the Icelandic Industrial Disputes Act, is not considered to be in breach of Article 6(4), when considered in the light of Article 31.⁸⁵ Where rules are too complex or restrictive, however, they will be in violation of the Charter. The prime example here is the UK, whose rules in this area have, for many years, been regarded as incompatible with the Charter. More recently, legislation on this point in the Czech Republic, Lithuania (two-thirds majority of workers concerned required), Romania (requirements of representativity and simple majority), and Hungary has been found to breach Article 6(4).⁸⁶ A common feature here has been a requirement for at least 50 per cent of the 'workers concerned' – regardless of how many participated in the ballot – to vote in favour of the strike. Some states impose further requirements.

Secondly, rules may lay down requirements for giving notice – to the opposing party, sometimes also to a mediation or conciliation body – before a resolution to take collective action can be implemented. Rules in this area are fairly conventional in practice. In Norway, for example, 14 days' notice must generally be given to the opposing party, and there is also an obligation to notify the National Mediation Authority as soon as such notice (*'plassoppsigelse'*) to the opposing party has been

⁸⁵ Cf. Conclusions XIV-1 (1998) 389, where the Icelandic rules are considered, and no negative Conclusion is drawn. These provisions have not been addressed in later control cycles, except to be noted by way of reference (cf. Conclusions XIX-3 (2010) Iceland). The statutory provisions are in Chapter II of the Trade Unions and Labour Disputes Act, 1938 – lög nr 80/1938 um stéttarfélag og vinnudeilur – section 15 (as amended by Act No 75/1996).

⁸⁶ On the UK, see Conclusions XII-1 (1992) 131, Conclusions XIII-1 (1994) 160, Conclusions XIV-1 (1998) 805, Conclusions XV-1 (2000) 639, Conclusions XVI-1 (2002) 689, Conclusions XVII-1 (2004) 517–518, Conclusions XVIII-1 (2006) 820–821, and now Conclusions XIX-3 United Kingdom, where the negative assessment is maintained. On the Czech Republic, see Conclusions XVI-1 (2002) 140, and Conclusions XVII-1 (2004) 101, subsequent to which domestic legislation was amended; in Conclusions XIX-3 (2010) the assessment was no longer negative on this point. On Lithuania, see Conclusions 2004, 347, following legislative amendments the Committee left the issue pending in Conclusions 2010; and on Romania Conclusions 2002, 134–136, upheld in Conclusions 2010. Concerning Hungary, see Conclusions XVIII-1 (2006) 405–406, with references back to the first supervision of Hungary in Conclusions XVI-2 (2003); no report was submitted and hence no conclusions appear in Conclusions XIX-3 (2010).

given.⁸⁷ In Denmark, a mixed seven and 14 days' requirement applies on the basis of collective agreement; in Sweden there is an obligation to notify the State Mediator seven days on beforehand. In Slovenia, ten days' notice must be given in certain sectors.⁸⁸ In the Former Yugoslav Republic of Macedonia (FYROM), a requirement of advance notice to the employer applies.⁸⁹ No objections have ever been raised to such rules or time limits. In this context, it is indicative that a duty to give two weeks' notice to the opposing party, mediators and local authorities was expressly accepted as being 'of reasonable duration' in the case of Estonia in 2006.⁹⁰

Rules of the third type correspond more closely to the general understanding of a 'cooling-off' period.⁹¹ These rules require a 'waiting period' (additional to the notice period referred to above) before the collective action may commence. This type of arrangement is familiar in many different forms. The most typical combines postponement of the start of collective action with either voluntary mediation or compulsory mediation of various types, that either applies automatically, or following a decision by a mediating agency or similar body. Such rules apply in, for example, Denmark,⁹² Iceland⁹³ and Norway,⁹⁴ as well as a number of other countries including Ukraine. Basically no objections have ever been raised to these rules, much less have questions been raised as to their conformity with Article 6(4). In this regard, it is telling that the Committee, in its first Conclusions, explicitly found Danish and Norwegian law to be in conformity with the requirements of Article 6(4) on this point,⁹⁵ and the rules have not been regarded as problematic since. The duration of rounds of mediation and temporary bans on collective action may vary. Minimum time limits of two to three weeks have been accepted.⁹⁶ Similarly, a ban of 30 days has expressly been found

⁸⁷ Cf. section §15–17 of the Act of 17 June 2005 No 62 on Working Environment, Working Time, and Dismissal Protection, and LDA sections 28 and 29.

⁸⁸ Cf. Conclusions 2010 Slovenia, Article 6(4), where the 'restriction, concerned is deemed *prima facie* compatible with Article G RevESC.'

⁸⁹ Cf. Conclusions XIX-3 (2010) "the Former Yugoslav Republic of Macedonia".

⁹⁰ Conclusions 2006, 187–188, upheld on this point in Conclusions 2010. Further, in a number of cases time limits of five, seven, or ten days have been accepted, explicitly or without specific comments, cf. most recently Conclusions 2010 Azerbaijan (10 days to opposite party and 'other relevant authorities').

⁹¹ Certain more recent conclusions by the ECSR may raise doubts as to the Committee's understanding of the concept, but to date there has been no reason to attach importance to this (cf. *infra* at n 97–100).

⁹² In Act No 192 of 6 March 1997 on Mediation in Labour Disputes, under which already initiated collective action may also be ordered to be temporarily suspended.

⁹³ Chapter 3 of the Trade Unions and Labour Disputes Act, 1938 (n 85).

⁹⁴ See particularly section 29 *et seq.* LDA.

⁹⁵ Conclusions I (1969–70) 40. The Committee stated that: 'It recognises that the restrictions on the right to strike in these states – denial of the right to strike ... during a 'cooling-off' period ... – could not be regarded [in the light of the Committees general interpretation] as incompatible with the Charter.'

⁹⁶ I.e. for Finland, Conclusions XIV-1 (1998) 219. The minimum time limits in Norway are the same.

not to 'raise any problem of compliance'.⁹⁷ At the same time, the Committee did not respond negatively to a time limit of 75 (+15) days applicable in Cyprus, but reserved the right to return to the question after having investigated the situation in all other states parties.⁹⁸ So far, no such investigation has been carried out, and in Conclusions 2010 the ECSR did not even touch upon the issue in respect of Cyprus.

More recently, yet another aspect was added to the development of the Committee's practice. In 2002, the Committee reached a negative Conclusion concerning the Czech Republic, on the grounds that its national law forbade the commencement of strike action prior to an attempt at mediation, and also completely failed to address the issue of how long such a temporary ban on strike action could continue. The Committee merely made a cursory remark that the obligation to attempt mediation was 'considerably more onerous' than the obligation implied by a 'cooling off period', and constituted a restriction on the right to collective action that was in breach of the Charter.⁹⁹ That the time limit in question was 30 days is apparent from the Committee's Conclusion in the next supervision cycle, which repeated the negative finding without any further discussion.¹⁰⁰ The finding was repeated once again in 2006, but was subject to a strongly worded dissenting opinion that maintained, among other things, that the evaluation of the Czech legislation was otherwise inconsistent with the Committee's case law in this area.¹⁰¹ Neither in 2006, nor previously, was the situation in other states (re-)evaluated on the basis of the interpretative stance applied to the Czech Republic. Accordingly, the Committee did not reach any negative Conclusions concerning other states in which similar schemes to that in the Czech Republic prevail. The debate about (in)consistency and borderlines in case law resulted, however, in the Committee deciding in June 2006 to commission a comprehensive report regarding the applicable rules in various states and the Committee's own case law in this area, with a view to the next supervision cycle, where compliance with Article 6(4) was to be considered.¹⁰² However, Conclusions XIX-3 (2010) and Conclusions 2010 show no trace of no such examination and report. On a rather more pragmatic note, the ECSR refrained from repeating the negative Conclusion for the Czech Republic on this point. Citing the gist of its earlier reasoning, the Committee, without expressing any assessment, insipidly stated that it 'notes from the report that there have been no changes to the situation. However, the Committee asked for further information

⁹⁷ Cf. Conclusions XIV-1 (1998) 595 (the Netherlands' Antilles), where the assessment is linked explicitly to the general position adopted with the interpretative statement in Conclusions I and subsequent practice. See, further, D. Harris, J. Darcy (n 12) 106–107.

⁹⁸ Conclusions XIV-1 (1998) 157 (Cyprus).

⁹⁹ Conclusions XVI-1 (2002) 141 and 142.

¹⁰⁰ Conclusions XVII-1 (2004) 101–102.

¹⁰¹ Cf. Conclusions XVIII-1 (2006) 229–230, and the Dissenting opinion of Mr. Evju, joined by Mr. Birk and Mr. Mikkola, *ibid.*, 249–250.

¹⁰² Private information of the author.

on how this time-limit applied in practice and reserves its position on the matter.¹⁰³ That is a classic way of shrouding a compromise, maybe one fuelled by the earlier dissenting opinion (cf. at n 101), but also one to smooth over a reluctance to grapple with the issue across the board. Which course the Committee eventually will take, is an open question.

A complete reappraisal from 2004–2006 to 2010 concerns Sweden. Pursuant to the Joint Determination Act (cf. n 36), section 62a, a failure by a party to give requisite notice of collective action, or the implementation of collective action in violation of a postponement order, may lead to a civil law fine (*varselavgift*, literally notice fee) of SEK 30 000 to 100 000 (3 300–10 800 €), or SEK 300 000 up to 1 million (33 000–108 300 €), respectively. Decisions on imposing fines are taken by a court of first instance (*tingsrätt*) at the request of the National Mediation Office. In 2002, the ECSR deemed this to be incompatible with Article 6(4), on the grounds tersely stated that ‘The Committee considers the fines to be disproportionate’, a view that was accompanied by a sharp dissenting opinion.¹⁰⁴ The Committee’s stance was reiterated in 2004 – and so was the dissenting opinion.¹⁰⁵ In 2006 the ECSR retreated, referring to an on-going domestic examination that was to review the operation of the National Mediation Office, including the fine system, and deferred its decision. The Committee report in question was tabled in March 2006, but had not resulted in any changes by early 2010.¹⁰⁶ Recalling its previous concern the ECSR now accepted the situation as being in conformity with Article 6(4), stating that:

‘However the Committee has re-examined the situation and it considers that given the relative wealth and resources of the organisations concerned the level of fines cannot be considered as too high. Further it notes that a fine has only ever been imposed one occasion.’¹⁰⁷

This goes to illustrate how assessments can come to change, even if the factual and legal basis on which they rest are unchanged. This is also illustrated in the following section.

¹⁰³ Cf. Conclusions XIX-3 (2010) Czech Republic, Article 6(4), section on Procedural requirements.

¹⁰⁴ Cf. Conclusions 2002, 237, and Dissenting opinion of Mr. Evju joined by Mr. Grillberger and Mr. Birk, *ibid.*, 264–265.

¹⁰⁵ Cf. Conclusions 2004, 566 and 597 (Dissenting opinion of Mr. S. Evju joined by Mr. R. Birk; Mr. Grillberger had left the Committee on the expiry of his mandate).

¹⁰⁶ The Swedish report is SOU 2006:32 *God sed vid lönebildning* (Good Practice in Wage Formation). Sweden’s national report for the 2010 control cycle, 9th National Report on the implementation of the European Social Charter (revised) submitted by the Government of Sweden (Articles 2, 4, 5, 6, 21, 22, 26 and 29 for the period 01/01/2005 – 31/12/2008), was registered by the ESC Secretariat on 2 February, 2010.

¹⁰⁷ Conclusions 2010 Sweden, Article 6(4). The issue of proportionality was a key point in the previous dissenting opinions.

7.2. OTHER STATE INTERVENTION

Beyond 'procedural' constraints, further questions relate to 'material' restrictions in the form of interventions in the right to collective action, or *powers to intervene* – to prohibit collective action, to require the maintenance of 'minimum service', etc.

The basic principle is simple: the extent to which states may intervene is limited. Article 31 ESC (Article G RevESC) lays down *material* constraints. Intervention is only permissible to the extent compatible with Article 31. An initial question, however, is whether Article 31 should also be understood as establishing *formal* restrictions. The problem here is best illustrated with reference to Norway.

The Committee did not address the Norwegian practice of imposing compulsory arbitration (*tvungen lønnsnevnd*), whereby arbitration, with a conjoint ban on collective action, is made compulsory in given disputes of interest by means of an *ad hoc* Act of the Storting (Parliament), until the first Norwegian cases had already submitted to, and been considered by, the ILO.¹⁰⁸ Subsequently, the Committee criticised the powers of the Norwegian authorities to impose compulsory arbitration, and eventually came to form the view, expressed in 1992, that the apparent absence of any limitations on these powers was, in itself, a breach of Article 6(4). Accordingly, the Committee stated that:

'The Committee considered that the apparent absence of any limitation on the government's power to intervene in strike action, and the consequent absence of any protection of workers in itself constitutes a breach of Article 6 para. 4 since without any such protection there is no real recognition of the right to strike as required by this provision of the Charter.'¹⁰⁹

This view was maintained until 1995, when the Committee pointed out there was still an absence of any legislation establishing any more detailed conditions determining the circumstances in which the authorities might intervene by imposing compulsory arbitration.¹¹⁰

While this view, on the face of it, may appear plausible, it was, nonetheless, extremely problematic. Whether it was based on a misunderstanding of the legal situation in Norway, or was simply the result of inadequate analysis, it was equally untenable. Norway has no legislation giving any public authority – whether in the form

¹⁰⁸ The ECSR first raised the issue in 1985, in the form of a question, referring explicitly to information received from the ILO (Conclusions IX-1 (1985) 57). Not counting a quite obscure case from 1963, the first Norwegian case complaining of an intervention under ILO Conventions Nos. 87 and 98 was submitted in December 1981 and decided in 1982, the Committee on Freedom of Association (CFA) finding the intervention to be 'inconsistent with the principles of freedom of association' (cf. CFA Case No 1099, Report No 217 (*Official Bulletin* Vol. LXV, 1982, Series B, No. 2)). This first case was followed by a further nine (as per 2011), the last one submitted to the CFA in February 2007, and decided in 2008.

¹⁰⁹ Conclusions XII-1 (1992) 130.

¹¹⁰ Conclusions XIII-3 (1996) 133.

of central government, individual ministers, *etc.* – any powers to impose compulsory arbitration. The imposition of compulsory arbitration in any individual case requires the passing of a special Act. To observe that a state's legislature may pass legislation in breach of that state's human rights obligations is trite. But does this mean that the powers of a state's legislature to enact legislation should be restricted through positive provisions in that state's domestic law, along the lines prescribed by Article 31 of the Charter? Such restrictions would represent a major step in a fundamentally new direction. In the absence of a type of 'meta-constitution' with this sort of effect, the reality would be that all states parties would be in breach of the Charter, and not only in respect of the area covered by Article 6(4). Even where the right to strike has constitutional protection in one form or another, the constitutional provision will generally refer to more detailed regulation put in place by means of legislation. As we have seen in the past, it is also the case that such constitutional provisions may be amended or repealed. In any event, they do not provide effective protection of an absolute nature.

Partly on the basis of such arguments, the Committee abandoned its previous position and proposed, instead in 1998, that interventions in the form of compulsory arbitration should be evaluated on a case-by-case basis.¹¹¹ The Committee has adhered to this position ever since, although its scrutiny has varied in intensity.¹¹²

The position is different, however, in cases where state intervention measures are of a more permanent nature. Where national law imposes fixed rules on issues such as what constitutes 'essential services' or the required level of 'minimum service' during a dispute, the Committee's practice is clear. Such rules must be evaluated in relation to Article 31, on the basis of the actual *content* of the relevant provisions ('the state of the law').

The final question in relation to this area of the Committee's practice is more problematic. It concerns cases where, by virtue of legislation, an administrative body, such as a government, a Minister or a government Ministry, is vested with authority to intervene, i.e. (broadly speaking) has *delegated* authority. This may bring about a situation where the power to intervene is judged on the basis of the apparent legal situation ('the situation in law'), regardless of the extent to which, and possibly how, the power is actually used. This is the case, for example, as regards Denmark, where the National Mediator is empowered to *combine* the results of the ballots of several unions over a mediation proposal.¹¹³ The very *existence* of this power has been the basis of negative Conclusions, initially under Article 6(3), and subsequently under Article 6(4).¹¹⁴

¹¹¹ Conclusions XIV-1 (1998) 620–621.

¹¹² The same applies to functionally equivalent forms of interventions occurring, e.g. in Denmark and Iceland.

¹¹³ See section 12 of the Act No 192 of 6 March 1997 on Mediation in Labour Disputes.

¹¹⁴ Cf., initially, Conclusions XVI-1 (2002) 175–176, later, e.g., Conclusions XVIII-1 (2006) 271–273, and most recently, Conclusions XIX-3 Denmark. The Danish statutory provision is not exactly a novelty,

If the delegated authority is subject to conditions or restrictions, these must, of course, be examined to assess whether they are sufficient for the arrangement to be considered to conform to Article 31. Alternatively, the Committee may evaluate how the rules regulating the delegation of authority are applied *in practice* ('the situation in fact'), rather than evaluating the rules in isolation.¹¹⁵

It must be noted that the Committee's case law has not been particularly systematic with regard to the adoption of any one of the above approaches. Accordingly, there is good reason to ask whether the Committee's case law in the area has been particularly consistent in substantive respects. This is an area where more systematic and intrusive monitoring and supervision by the Committee would undoubtedly have the potential to develop the law, with regard both to specific conclusions and normative principles.

8. CONCLUDING REMARKS

The same may be said of the law on collective action in general. However, this is an area that is far from uncomplicated. There are major variations, in part, of a fundamental nature, between the law on collective action in different European countries. There are also, naturally enough, rather different views as to what principles should be considered fundamental, what rules should be developed, and how they should be assessed. This inevitably affects legal development at an international level. Treaty 'interpretation', like the application of the law at a national level, is a complex process. The Committee's case law under Article 6(4) – and most likely under other provisions of the Charter as well – must be seen in the light of such differences, both in the Committee's early years and more recently with the changing viewpoints and diverging opinions that are in evidence. The overarching challenge is to unite the Charter's rules and founding principles through solutions that respect different legal cultures and regimes. As this article may have suggested, this is an ongoing challenge, and while it pertains to the European Social Charter, it is, correspondingly, no less true otherwise on the European scene, where considerations such as those embodied in the Charter are confronted with fundamentally differing perceptions favouring instrumental considerations that are clearly difficult to reconcile with those of the ESC. Complexity notwithstanding, these are challenges and tasks that need to be properly attended to, within as well as outwith the framework of the European Social Charter, if the commonality of European legal orders is to prevail.

it stems from an amendment Act passed in 1934. It is, perhaps, symptomatic in several ways that more than 30 years passed from Denmark's ratification of the ESC and the first control cycle, to the Committee's identifying the rule as an issue. Apparently, this occurred only after the same provision had been brought to the attention of the ILO in the context of a complaint case. See Conclusions XV-1 (2000) 147–148, where the issue was addressed in the form of questions to Denmark. The relevant Danish case in the ILO is CFA Case No. 1418, Report No 254 (*Official Bulletin* Vol. LXXI, 1988, Series B, No. 1).

¹¹⁵ On the former see, e.g., Conclusions XVI-1 (2002) 578–579 (Portugal), and on both aspects, e.g., Conclusions XVII-1 (2004) 449–450 (Spain).