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***ASSESSING THE STRENGTHS AND WEAKNESSES OF THE
EUROPEAN SOCIAL CHARTER'S SUPERVISORY SYSTEM***

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EUROPEAN SOCIAL CHARTER'S SUPERVISORY SYSTEM***

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“Assessing the Strengths and Weaknesses of the European Social Charter’s Supervisory System”

Since 1961 the European Social Charter (ESC) has been the flagship of international instruments dealing with social rights broadly defined. It constitutes a benchmark against which other international standards and supervisory arrangements in this field have come to be judged. This paper identifies a range of initiatives designed to make the Charter’s supervisory arrangements more effective. It consists of four parts: (i) situating the ESC within the overall European human rights regime; (ii) a comparison with the International Covenant on Economic, Social and Cultural Rights; (iii) an examination of the ESC’s strengths and weaknesses as demonstrated by a case study of Italy; and (iv) specific recommendations for enhancing effectiveness.

Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System

Philip Alston*

1. Introduction

For almost half a century, the European Social Charter (ESC) has been the flagship of international instruments aiming to promote the integrated protection of a comprehensive range of social rights. While a large number of conventions and recommendations adopted by the International Labour Organisation blazed the social rights trail at the international level, these did not add up to a comprehensive social rights agenda. At the United Nations level, the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹ did not enter into force until fifteen years after the adoption of the Social Charter. Similarly, the equivalent instrument within the Inter-American human rights system – the Protocol of San Salvador – entered into force only in 1999 (exactly eleven years after its adoption).²

The ESC is thus of major importance both in its own right and as a benchmark against which other international standards and supervisory arrangements in this field have come to be judged.³ It has been said to provide ‘the social and economic foundations of human rights protection on the continent of Europe’.⁴ But despite its undoubted achievements, which have been amply documented elsewhere in this volume and in other recent publications,⁵ the ESC has not succeeded in having quite the impact for which its proponents would have wished. Moreover, its place in the overall scheme of European human rights mechanisms in the twenty-first century remains somewhat uncertain.

* I am grateful to Alexandra Gatto for her assistance in gathering materials for use in the Italian case study contained in this Chapter.

¹ Available at <http://www.ohchr.org/english/law/cescr.htm>

² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol Of San Salvador”). Available at <http://www.cidh.oas.org/Basicos/basic6.htm>

³ This is best exemplified by regular reference to the ESC system in the debates over the adoption of an optional complaints procedure under the ICESCR. Although that debate began in the early 1990s it has only recently engaged the systematic attention of governments and it will not be until 2006 at the earliest that a definite decision is taken on the question of whether to draft such a protocol and on the extent to which it should follow the characteristics reflected in the collective complaints procedure adopted under the ESC. See for example the advice offered to the Working Group of the UN Commission on Human Rights by Mr. Kristensen, Deputy Executive Secretary of the Committee of Independent Experts established under the ESC. ‘Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session’, UN doc. E/CN.4/2005/52, paras. 50-53.

⁴ Stein Evju, ‘The European Social Charter’, in Roger Blanpain (ed.), *The Council of Europe and the Social Challenges of the XXIst Century* (Kluwer, 2001) 19.

⁵ See Regis Brillat, ‘The Supervisory Machinery of the European Social Charter: Recent Developments and Their Impact’, chapter 000 in this volume; and more generally David Harris and John Darcy, *The European Social Charter* (2nd ed., 2000).

The principal objective of this chapter is to identify a range of initiatives that might be considered in order to make the Charter's supervisory arrangements more effective and more likely to be able to respond to the various challenges which it confronts, especially those arising out of the continuing expansion of the European Union, and the pressures to prioritise economic liberalization over social justice and cohesion. While much has been written on the European Social Charter in its various permutations, very few empirical studies have been undertaken in an effort to evaluate its impact or to assess the effectiveness of the procedures that have been devised over the years. While the present study cannot pretend to constitute a systematic or comprehensive case study, it is sufficiently grounded in the actual practice of the European Committee of Social Rights (ECSR) in relation to a representative case as to provide a basis for identifying possible reforms.

The chapter is divided into several parts. The first seeks to locate the ESC and its supervisory system within the overall European human rights regime. The second introduces an element of comparison with the ICESCR, on the assumption which will come as a surprise to at least some European social rights proponents, that the latter might have some useful lessons for the Charter system. The third, and perhaps the most important part of the chapter, seeks to contextualize the ESC system by examining its strengths and weaknesses through the lens of a detailed case study of the Charter's operation in practice. The final parts of the chapter aim to conceptualize the role of the Committee and then to identify some of the means by which the supervisory system could be made more effective.

2. The Place of the ESC within the Overall European Human Rights Regime

It is often said that the ESC is the 'counterpart' of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).⁶ The Council of Europe's website refers to the former as the 'natural complement' to the latter.⁷ Similarly, Brillat notes that the Charter 'has become one of the Council of Europe's major treaties, alongside the European Convention on Human Rights, which served as its model and continues to do so.'⁸ These claims to some form of equivalence with, and complementarity to, the ECHR are generally also mediated through references to the principle of the indivisibility of the two sets of rights.

It needs to be acknowledged, however, that despite the desirability of a situation in which economic and social rights are accorded equal importance with civil and political rights, this is far from being the actual situation. While there are many reasons which can be offered for the discrepancies that exist in practice,⁹ and not all of the differences in treatment are necessarily problematic, the bottom line is that social rights remain the poor

⁶ Ibid, inside front dust jacket.

⁷ 'What is the European Social Charter?', available at http://www.coe.int/T/E/Human_Rights/Esc/1_General_Presentation/default.asp#TopOfPage

⁸ N. 000 above, p. 1.

⁹ See Philip Alston, 'The Importance of the Inter-Play Between Economic, Social and Cultural Rights and Civil and Political Rights', in *Human Rights at the Dawn of the 21st Century* (Strasbourg, Council of Europe, 1993) 59.

step-sister of civil and political rights and this is every bit as true within the Council of Europe as elsewhere. The fact that membership of the Council requires ratification of the ECHR but not of the ESC, the discrepancies in staff and resources devoted to the respective supervisory systems, the unequal roles accorded to the different rights within the broad promotional activities of the Council, and a variety of other indicators all tell a story which helps to explain at least some of the challenges confronted by those who would wish to reform the ESC supervisory system.

3. Introducing a Comparative Dimension: the ICESCR

One of the aims of this chapter is to consider whether there are any lessons that might be learned in relation to the monitoring arrangements under the ESC from the experience of the comparable tasks undertaken within the United Nations framework in relation to the ICESCR. The Charter itself only predated the adoption of the Covenant by five years, but whereas the Charter set up a system of supervision which began functioning in the late 1960s, its UN counterpart was not established until 1987. Such comparisons are potentially useful insofar as the two monitoring bodies face many of the same challenges. They seek to evaluate compliance with comparable normative obligations, they face similar problems of mobilizing civil society and of obtaining alternative sources of information, and they are dealing with similar levels of skepticism in relation to the role of international supervisory organs in influencing domestic social policies.

By the same token, it needs to be recognized that while such comparisons can be instructive they are also potentially fraught to the extent that techniques which work in one setting might be almost irrelevant in another, or might even be counter-productive. This follows from the fact that each of the two systems has its own separate texts with very different drafting histories, a quite different set of assumptions motivating the original drafters, different governmental actors and traditions, and different inherent strengths and weaknesses which cannot necessarily be transplanted in any meaningful way. In addition to this general caveat there are two other factors which caution against taking the comparison in this case too far. The first is that the ESC mechanism is considerably more advanced and sophisticated, in some respects at least, than its UN counterpart.

The second is more complicated and goes to the ethos of legalism and the processes of change and reform in the two systems. While the ICESCR system has evolved very significantly in the space of only some 15 years from the basis of a very vague and general resolution of the UN's Economic and Social Council (ECOSOC), the development of procedures within the ESC system has tended to be much more legalistic. Several factors account for these differences and they are of direct relevance to the focus of this paper. One is the stronger role of the Council of Europe secretariat than its United Nations counterpart in the Office of the High Commissioner for Human Rights. It serves to restrain the opportunities open to the Committee to innovate and to adopt flexible interpretations of its rules and procedures. Another is the greater feasibility of careful governmental scrutiny of all that is done under the ESC system, both through the active involvement of the Strasbourg permanent delegations and through the role accorded to

the Governmental Committee and the Committee of Ministers. While the UN Commission on Human Rights and even the ECOSOC (the nominal parent body of the UN Committee on Economic, Social and Cultural Rights) might be supposed to play this role they have not in practice and the Committee tends, as a result, to have much more leeway in terms of systemic innovations.

The differences can be illustrated by the example of past reforms in the two systems. In the very early 1990s I was asked by the then Director of Human Rights at the Council of Europe to join a small expert group, the purpose of which was to explore the type of reforms that might be undertaken in order to make the European Social Charter system more effective. The group met in private and I doubt that its report was ever made public. It nevertheless began a process which was remarkably successful, one that led to the revision of the Social Charter, a major upgrading of its provisions, and the introduction of a collective complaints procedure. The lessons that I took from this experience with the ESC were that major and far-reaching reforms were feasible, personalities were important (Peter Leuprecht and a couple of key ambassadorial allies played a key role in the whole process), and that inter-governmental processes are the principal means of achieving progress.

In sharp contrast, the experience under the ICESCR points to the opposite conclusion in most respects. Big ideas are rarely appreciated within the UN system and are more likely than incremental strategies to attract strong opposition. They tend to frighten governments and to bring out all sorts of active and passive resistance strategies. The inability of governments within the UN Commission on Human Rights context to come to grips with the proposal put forward for a complaints system under the ICESCR is a good example. A draft Optional Protocol was proposed by the UN Committee in 1993. The same year the Vienna World Conference on Human Rights ‘encouraged’ the Commission, in cooperation with the Committee, to continue its examination of that proposal.¹⁰ The Committee sent a completed draft to the Commission four years later. In 2004, after a whole series of procedural debates and the appointment of an independent expert whose reports seemed not to move the process forward significantly, the Commission decided to continue for another two years the work of an open-ended working group which first met in 2003 with a mandate of considering ‘options regarding the elaboration of an optional protocol’.¹¹ As a result it is unlikely that the Commission will have a complete draft of a possible protocol before it in less than 15 years after the general idea was endorsed by the World Conference. And the adoption and entry into force of such an instrument would be likely to take an additional five years or so.

In contrast, however, to the snail’s pace at which formal reform processes work within the UN context, the Committee on ESCR has introduced a large number of important procedural innovations without any express authorization by the Commission or by the Meeting of States Parties to the Covenant. These innovations have been acquiesced in by

¹⁰ UN doc. A/CONF.157/23 of 12 July 1993, Part II., para. 75.

¹¹ See generally the ‘Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session’, UN doc. E/CN.4/2005/52.

the governments concerned and the result has been to achieve a considerable transformation of the procedures applied and accepted by reporting governments.

The relevance of this reflection on comparative reform processes is to underscore the fact that the contexts in which reforms of the monitoring systems under the ESC and the ICESCR are implemented are very different. Nevertheless, it seems unlikely that the Member States of the Council of Europe are likely to embark again in the near future on a revision of the ESC and that there are thus good reasons for the ECSR to reflect on ways in which it can develop its own procedures in order to respond to the particular challenges that are now confronting it. It is in that perspective that the experience of the UN Committee might have something to offer.

4. Evaluating the Strengths and Weaknesses of the ESC Reporting System

There is no shortage of useful analyses documenting the work of the European Committee of Social Rights and its predecessors in monitoring social rights in Europe.¹² But almost all of these studies are relatively abstract or decontextualized in the sense that they look at the system as a whole rather than at the ways in which it has functioned in response to a particular country situation. This orientation is not surprising. Much of the analysis has been undertaken by those with a stake of some sort or a role within the ESC system and anyone thus involved is more or less obliged to avoid country specific analyses and instead to opt for a more detached focus on the overall system.

Thus, one way in the present context to add value to the existing literature is to undertake a case study of the Committee's approach to the situation in one particular country in order to get a sense of the practical strengths and weaknesses of the system. While the experience of none of the 34 reporting states is necessarily typical in any generalizable sense, there are good reasons to take a large country with considerable resources available to engage in the exercise, with extensive experience in reporting under the ESC and a wide range of other international procedures, and a vibrant civil society. Based on these criteria, Italy is an appropriate case study and there is no reason to believe that it is atypical as a case study or that it shows symptoms that are not widely present in relation to the experience of other countries.

(a) Timing and the Role of the Different Committees

The best way to get a sense of the timelines and chronology involved in reporting under the ESC is to look at the specifics of a given country's reporting obligations. For present purposes the focus is on Italy which ratified the original European Social Charter in October 1965. It ratified the Revised Social Charter in July 1999, which rendered it liable to report on the two year period from January 1, 1999 until December 31, 2000 by a deadline of March 31, 2002. While the report was late, it was impressively timely by

¹² In addition to those cited in notes 4 and 5 above, see J-F Akandji-Kombé and S. Leclerc (eds.), *La Charte sociale européenne* (Brussels, Bruylant, 2001); L. Wasecha, *Le Système de contrôle de l'application de la Charte sociale européenne* (Geneva, Librairie Droz, 1980); and A. Jaspers and L. Betten (eds.), *25 Years: European Social Charter* (Deventer, Kluwer, 1988).

the standards that operate within the United Nation where state's reports are usually a year or so late at best. Italy sent in its report on July 7, 2002. The report was considered by the Committee in the course of 2003 and its conclusions were adopted in June 2003,¹³ some two and a half years after the legislative and policy developments which it describes, but only one year after the report was presented. The Committee's conclusions were then subjected to the next round of scrutiny by the Governmental Committee which published its full report for 2004 only in April 2005.¹⁴ The latter report is then sent to the Committee of Ministers which will finalize the process by determining whether or not any further action is required.

The focus of the Italian report is on the 'non-hard core' provisions of the Charter,¹⁵ and the Committee requests the government to submit its report on the 'hard core' provisions¹⁶ by March 31, 2006. It also asks that the answers to the questions that it has signaled as having gone unanswered in this round should be provided by March 31, 2004, thus giving the government an additional two years in which to complete its report for the period ending December 2000.

Several conclusions emerge from this information. First, the proceedings are complex, and a non-specialist will have to make a significant effort to understand the distinction between the hard-core and non-hard-core provisions, as well as the precise roles being played by each of the levels of supervision. Second, the staggering of the overall exercise, both in terms of governmental reporting on different issues, and the timing of the contributions by each of the three committees (expert, governmental, and ministerial), means that there is no conclusive date until the last of the committees has finally pronounced itself, by which time the likelihood of attracting any significant public attention has long since passed. Third, a single round can take close to a decade to complete by the time both cycles have been finished and each of the instances has had its say. These are hardly the hallmarks of a system designed to have a significant impact on public opinion or to ensure timely interventions in response to important concerns.

(b) The Governmental Report

¹³ European Committee of Social Rights, Conclusions 2003, Vol. 1 (Bulgaria, France, Italy).

¹⁴ Governmental Committee of the European Social Charter, *Report concerning Conclusions 2004*, Council of Europe doc. T-SG (2004) 26 of 8 April 2005, available at http://www.coe.int/T/E/Human_Rights/Esc/3_Reporting_procedure/3_Follow-up_to_the_Conclusions/ETSG2004_26_Det_Report_Conclusions_2004-1.pdf.

¹⁵ This term refers to the following Articles of the Revised ESC: Articles 1 para. 4, 2, 3, 4, 9, 10, 15, 21, 22, 24, 26, 28 and 29.

¹⁶ This term refers to the following Articles of the Revised ESC: Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20 (except Article 1 para. 4).

The Italian report was some 130 single-spaced pages in length and written in French.¹⁷ It is not clear whether it was also available in Italian, but this seems unlikely and the present author was unable to track it down if it was. The report contains no general introduction and no information as to how it was compiled, no indication as to whether there was any consultation within the government at large or with civil society groups, and no details of whether, once completed, it had been disseminated within Italy by the government. It consists of a dry factual statement describing various legislative and administrative initiatives systematically and in detail. Those elements are supplemented with extensive statistics from official Italian and European sources. It does not seek to situate itself within the context of previous reports submitted by the government on the same issues, or of comments made in earlier rounds by the Committee. Nor does it flag major criticisms of government policies which might have been made by social policy groups or others. It is, in brief, a detailed technocratic accounting which will be inaccessible to the great majority of Italians, whether because they do not read French or because they do not have the necessary background to give meaning to an otherwise lifeless report.

(c) The Report of the ECSR

The Committee's analysis of the government report is detailed and not only addresses every single paragraph of each article of the Revised ESC, but also specifies the information it needs in order to assess conformity. Thus, for example, in relation to the right to adequate remuneration (Art. 4(1)) it seeks information on 'the net value ... of the average wage' after deductions, a comparison between wages under collective agreements and those outside them, and inflation-adjusted figures over time.¹⁸ The conclusions reached by the Committee take up 110 single-spaced pages and arrive at a conclusion in respect of every paragraph of the relevant articles, a total of 57. In nine cases it found the situation to be in conformity. In another 15 cases,¹⁹ it decided that there was a discrepancy (i.e. non-conformity). But the most revealing outcome was the deferral of any conclusion in relation to 33 of the articles, or over 60% of the issues under review. In those cases the Committee concluded that it needed 'further information in order to assess the situation'.²⁰

Even more surprising is that at least some of the findings of conformity are also based on a lack of relevant information leading the Committee to conclude that '[s]ince there is no information in the report, the Committee considers that the situation, which was held to

¹⁷ Ministère du travail et des politiques sociales, Direction générale de la protection des conditions du travail, Division II – affaires internationales du travail 1er rapport biennal du gouvernement italien sur l'état d'application de la Charte sociale européenne, revue, articles 1 – 5 – 6 – 7 – 12 – 13 – 16 – 19 – 20, période de référence : 1er janvier 1999 – 31 décembre 2000, at http://www.coe.int/T/E/Human%5FRights/Esc/4%5FReporting%5Fprocedure/1_State_Reports/Revised_Social_Charter/2002/Italy%201st%20report.pdf

¹⁸ Ibid., 257.

¹⁹ Although there were two dissenting opinions, which related to articles 4 (5) and 26 (1) and 26 (2). Ibid., 352-53.

²⁰ Ibid., 244.

be in conformity with the Charter, has not changed.’²¹ On its face, such a methodology is surprising. In order to be valid it would have to reflect a finding, based on independent research, that there is no reason to conclude that problems have arisen. But if that is the case it would seem appropriate to give some indication to that effect and to refer to the sources used.

But while a 60% governmental non-response rate is very high, the problem is compounded by the fact that in many of those instances the Committee had sought and failed to receive the same information in the context of its previous examination of the situation in Italy. Thus, for example, the whole procedure is paralysed in relation to Article 14, the right to benefit from social welfare services. In relation to each of the two paragraphs the Committee takes note of a very limited amount of information contained in the government’s report, repeats in detail the information previously sought and not provided, and accordingly ‘defers its conclusion’ pending receipt of the information. No intimation is given that a negative conclusion would follow from the non-provision of information. As a result, the approach adopted effectively rewards the government and provides very little incentive for a detailed reckoning in the future.

The report does not suggest reasons for the very high non-response, nor does it seek to draw attention to it in any concerted way. The reasons can thus only be surmised. The failure to penalize significantly non-reporting would seem to be one explanatory factor. The amount of detail sought by the Committee and its decision not to prioritize any particular issues over others might be another. The fact that this was one of the very first reports under the Revised Social Charter might explain some of the gaps in information, but that seems unlikely given that in many cases the same information was absent from the previous report.

Another aspect of the report which is especially revealing is the list of sources of information to which reference is made. The breadth of available sources and their reliability has long been a key indicator of the effectiveness of international monitoring and supervision of human rights obligations. For many years in the United Nations context, the assumption pushed by governments was that the only reliable information that could be invoked was that emanating from governmental or inter-governmental sources.²² In fact, of course, the opposite was often true and the only way to measure the reliability of official information was to test it against other, usually non-official, information whether from the media or non-governmental organizations.

The ECSR report does not list in any one place the range of sources used, nor does it provide any explanation as to which sources were chosen and on the basis of what criteria. A careful reading of the report indicates that internet-based sources have been consulted to a significant extent but that the Committee is rather loathe to rely on information from non-governmental organizations (NGOs) or to contrast governmentally provided information with that from other sources. Thus the report is assiduous in making use of information from official Italian sources, including the websites of the

²¹ *Ibid.*, 278, in relation to Art. 10(5)(c) on the provision of training during working hours.

²² See Report of Independent Expert, UN doc. A/44/668 (1989), para. 119.

Ministries for Education,²³ Labour and Welfare,²⁴ and for Universities.²⁵ In addition, reference is made to the report submitted by Italy under the United Nations Convention on the Rights of the Child,²⁶ and to the views of a government advisory body.²⁷ The major sources of information cited are other international organizations such as the ILO,²⁸ the European Union,²⁹ the Organization for Economic Co-operation and Development (OECD),³⁰ the World Health Organization,³¹ the Council of Europe,³² and statistical agencies such as the European Statistical Office,³³ and its Italian counterpart.³⁴

Only two NGO sources are cited. One is the European Anti-Poverty Network (EAPN) and reference is made to its comments on the Italian Government's Action Plan on Social Inclusion.³⁵ This is information available on an EU website.³⁶ And another reference is to a report on housing prepared jointly by the main Italian trade union umbrella groupings.³⁷ Somewhat paradoxically, one of the Committee's observations in relation to the problem of sexual harassment at work is to note that 'intensive information campaigns are carried out by a variety of actors (trade unions, law firms, NGOs, etc.) in particular via the Internet.' The Committee then asks the government what steps it has taken to 'make sure that [this information] reaches all corners of the Italian labour world.'³⁸ This is paradoxical in two respects. First, the Committee is acknowledging that it has searched the internet in order to bolster its conclusions, and that it is prepared to take cognizance of civil society reporting, but in the entire report it makes only this single reference to the material thus available. Second, while drawing attention to the significance of this issue in practice, the Committee gives no details of the problem and does not draw attention to the incongruence of the empirical situation and the government's failure to address the issue in its report.

The apparent paucity of non-official sources has a variety of consequences for the nature of the reporting procedure and its potential effectiveness. First, it leaves the government report and related sources as the predominant basis of deliberation, and does not put the government under any particular pressure to establish either the veracity of its claims or to respond to concrete information which would show that while necessary legislation is in place, the practice on the ground is not in conformity with the Charter. Second, in the absence of any 'alternative' sources of information, the evaluation is a very tame affair

²³ Italian Report, note 17 supra, 263 and 276.

²⁴ Ibid., 264-65, and 345.

²⁵ Ibid., 269-70.

²⁶ Ibid., 302.

²⁷ The Consiglio Nazionale Economia e Lavoro (CNEL), *ibid.*, 343, 344, and 347.

²⁸ Ibid., 254.

²⁹ Ibid., 271, 273, 274, and 345.

³⁰ Ibid., 279-80.

³¹ Ibid., 280-82, and 284.

³² Ibid., 336.

³³ Ibid., 254, 273-74, and 345.

³⁴ The Istituto Nazionale di Statistica, *ibid.*, 283.

³⁵ Ibid., 338.

³⁶ Ibid., 343, n.2.

³⁷ Ibid., 343 and 347.

³⁸ Ibid., 325.

and the overwhelming focus is on the legislative and formal administrative framework. Third, there is no incentive for the civil society groups to engage. Their information is apparently not solicited, and is certainly not used.

This final point is borne out by a brief survey of the extent to which the European Social Charter is an element in the work of the main Italian NGOs active in the social field. While the survey that was undertaken was confined to internet sources, there is no reason to think that a more broadly-based survey would have yielded different results. As far as trade union groups are concerned there are three main Italian labour confederations and each of them has shown an active interest in Europe, which is hardly surprising given the extent to which national labour law in the EU countries is increasingly dependent upon the EU framework.

The Unione Italiana del Lavoro (UIL) is the most internationally focused of the groups. Its European Office closely monitors EU legislative and political initiatives, and its website carries news and documentation in relation to the social and labour rights-related activities of the ILO, the OECD, and the UN.³⁹ The Council of Europe, however, is absent except for a generic link to the website of the Parliamentary assembly of the Council. There is no specific mention at all of the ESC.

The Confederazione Italiana Sindacati Lavoratori (CISL) is the second largest Italian labour group and participates actively in the Trade Union Advisory Group to the OECD (TUAC), the International Confederation of Free Trade Unions (ICFTU) and the European Confederation of Trade Unions Confederations (ECTUC). Its website also carries documentation on the work of the other regional and international groupings but not on the Council of Europe or the ESC.⁴⁰ The same applies to the Confederazione Italiana del Lavoro (CGIL), which has a European Secretariat monitoring EU developments but gives no more than a general link to the Council of Europe website. It is also worth noting that the websites of all three groups carry many reports which would be of direct relevance to the monitoring of the situation in Italy in relation to the rights dealt with in the ESC, which makes the Committee's failure to draw on the relevant materials all the more surprising.

The ESC also seems to have had a limited impact on the work of other civil society groups concerned with social rights in Italy. It seems that such groups are not exactly plentiful,⁴¹ in part because of a strong tradition of relying upon trade unions to pursue a wide range of social issues, extending well beyond traditional labour matters. Reliance upon the Catholic Church and the ubiquitous role it plays in society is another possible explanatory reason. Nevertheless, the absence of a powerful 'welfare lobby' of the type

³⁹ <http://www.uil.it>.

⁴⁰ www.cisl.it

⁴¹ The website of the Ministry of Labour and Social Affairs is required by the [Legge 7 dicembre 2000, n. 383](#) to maintain a register of associations involved in social affairs (the Registro Nazionale delle Associazioni di Promozione Sociale) at <http://www.welfare.gov.it/EaChannel/MenuIstituzionale/Sociale/associazionismo+sociale/documenti/elenco+associazioni+promozione+sociale.htm>. Most of the groups listed pursue very specific aims and are active in the cultural, entertainment, or religious fields.

found in many other countries is all the more noteworthy given the very strong presence of civil society groups in the debates over development cooperation, immigration, and trade. But the bottom line remains the same. Whether we take account of the work of the three major civil society groups involved with social rights,⁴² or of the groups participating in the European Social Forum in Florence in 2003,⁴³ the ESC remains entirely invisible.

Thus, despite a strong international orientation, it appears that neither the major trade union groupings nor the major civil society groups concerned with social rights more generally has a significant interest in the ESC or the work of the ECSR. This brings us back to the findings of comparable research on the impact of the complaints process provided for under the North American Free Trade Agreement (NAFTA) to the effect that:

arrangements which are applied as though their essential purpose is to facilitate dialogue are highly unlikely to be very effective in the absence of a range of additional measures designed to ensure broad-based participation, and to make it worth the while for individuals and non-state actors to invest an effort in the process.⁴⁴

The relevant groups perceive themselves as having no stake in either the input or the output side of the Strasbourg exercise, and so they behave accordingly. It would appear that they have concluded that it is either too difficult to make submissions to the Committee or that if made, those submissions would not be taken into account. The lack of a formal invitation to submit information or alternative reports, the inability to participate in any way in the relatively anonymous proceedings of the committee, and the sense that individual members are not worth lobbying in order to have a significant impact, all serve to reinforce that impression. Equally problematic, from the perspective of trade union groups and those dealing more broadly with social rights, is the fact that while the output (the report of the ECSR) is careful, professional, and legally sound, it is not seen to add enough value to the bargaining power of the relevant groups within the domestic political arena as to warrant a significant investment of time and resources.

⁴² Among those civil society groups that do have a significant focus on social rights, mention might be made of three in particular. The Associazioni Cristiane Lavoratori Italiani (ACLI), created in 1945, does provide on its website extensive references to a broad range Italian and European social issues, including a reference to the EU Charter of Rights at Work. See www.acli.it. The Associazione Ricreativa Culturale Italiana (ARCI) is a left of centre group, created in 1994, which has a particularly strong focus on international social policy and broader issues such as the new European Constitution. See www.arci.it. Finally, the Associazione per la Tassazione delle Transazioni finanziarie e per l'Aiuto ai Cittadini (ATTAC), which define itself as an 'international movement for democratic control of financial markets', was created in 1998 in Paris. The Italian section is particularly concerned with labour rights issues such as the reform of the Italian pension system and efforts to amend Article 18 of Legge no. 300/70 (the so called Statuto dei Lavoratori) regarding the right to reinstatement following unfair dismissal (Reintegrazione nel posto di lavoro). Its website carries significant information about the activities of the EU and the WTO. See www.attac.it. But none of these three organizations refers at all on its website to either the ESC or to the Council of Europe more generally.

⁴³ See <http://www.firenzesocialforum.net/>.

⁴⁴ Philip Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime', 15 *European Journal of International Law* (2004) 457 at 503.

Where, however, there are opportunities to make inputs and where the outputs have achieved sufficient public recognition as to make a difference, these groups do tend to be active. Thus the ILO and the OECD, esoteric bodies by general standards of public opinion, both offer significant participatory opportunities to the trade union groups and are able to attract some attention. Where the ILO has moved to introduce a procedure which is more clearly cosmetic, the level of interest on the part of the social partners is low. Where it continues to operate a system, like that overseen by its Committee on Freedom of Association, which is capable of having an impact, there is a continuing flow of inputs from trade union groups.⁴⁵

This is not the sole explanation, however. There would also seem to be a failure on the part of the ESC and its supporters to publicize their conclusions adequately. This is apparent from the fact that although two of the issues highlighted by the ECSR have been extremely newsworthy in Italy, the Committee's adverse findings have failed to gain any significant publicity.⁴⁶ The first of the issues concerns the rights of Italy's three million persons with disabilities,⁴⁷ a subject to which the Committee devoted considerable attention and on which it concluded that Italy had failed to conform to the Charter in relation to each of the three paragraphs of Article 15.⁴⁸ It should be noted, however, that the Committee's conclusion in each case focused solely on the absence of appropriate anti-discrimination legislation rather than on a range of government policies which have been widely portrayed as discounting the difficulties faced by persons with disabilities.⁴⁹

The second issue addressed by the Committee and which subsequently received major media attention concerns the right to reinstatement following a finding of unfair dismissal.⁵⁰ But the Committee's conclusion that Italian law excludes far more workers from protection in that regard than is permitted under the ESC⁵¹ drew little, if any, attention from civil society or the media.

(d) The Report of the Governmental Committee

It took almost two years for the Governmental Committee to evaluate the recommendations made by the Expert Committee on the Italian report and the result was to diminish any pressure that might have been generated by the Experts and, in effect, to defer to the positions once again urged by the Italian Government. This can be illustrated

⁴⁵ *Ibid.*, p. 513.

⁴⁶ Neither of the two principal associations devoted to the situation of persons with disabilities devoted any attention on their websites to the findings of the ECSR. See www.disabili.com and http://www.affarisocialihandicap.it/soggetti/r_associazioni.asp.

⁴⁷ Italian Report, note 17 supra, 292.

⁴⁸ *Ibid.*, 292-99.

⁴⁹ Thus, e.g., funding for special teachers for students with disabilities in the schools, has been withdrawn (see <http://www.scuolaitalia.com/genitori/escuola/rubriche/>) and the government has refused to provide special funding to facilitate employment opportunities for persons with disabilities (see <http://www.vita.it/articolo/index.php3?NEWSID=44766>).

⁵⁰ See note 42 supra.

⁵¹ Italian Report, note 17 supra, 323.

by the response in relation to the problems identified by the ECSR in relation to child labour.

The Government argued that the situation in practice ‘was not as serious as originally estimated to be or as serious as that in other Contracting Parties’. Nevertheless, it had undertaken ‘a wide ranging series of measures to address the problems’ such as the adoption of ‘a Programme of Action, a special training programme for the Labour Inspectorate, and family support policies.’⁵² In response to such reassurances the Governmental Committee welcomed the steps taken and ‘expressed the hope that the de facto situation would soon be in conformity with the revised Charter.’⁵³

In relation to allowances paid to apprentices, on which the ECSR had insisted on receiving specific figures which had again not been provided, the Italian delegate insisted that there was no problem and argued that there was no need for a warning. In response ‘[t]he Committee took note of the information provided by the Italian delegate: asked the Italian Government to provide detailed information in its next report; and considered that the warning previously addressed to Italy was still in force.’⁵⁴ That, in essence, was the outcome of the very lengthy process described above.

5. Conceptualizing the Role of the Committee

There are two essential elements required in order to be able to make suggestions as to the types of reforms that should be contemplated in order to make the ESC process more effective. The first is to obtain a clear sense of how it operates and of its principal strengths and weaknesses. This we have endeavoured to do on the basis of the foregoing case study of Italy and we will return shortly to the principal lessons that might be learned from that case.

The second is to have a reasonably clear idea of the roles played by the European Committee of Social Rights and of the expectations that key actors have for it. This is, however, not quite as straightforward as might have been assumed. The problem is well illustrated by the previous chapter in this volume in which Régis Brillat, the Executive Secretary of the European Social Charter, whose contribution to professionalizing the work of the Committee has been immense, suggests that the procedures of the Committee should be characterized as judicial or quasi-judicial.⁵⁵ While it would be difficult to contest the contention that the collective complaints procedure is a quasi-judicial one, it is more problematic to suggest that the procedure involving the supervision of states’ reports amounts to ‘a judicial procedure’. While the importance of such terminological questions can easily be overstated, they nonetheless serve to highlight an important question as to the aspirations of the system.

⁵² Governmental Committee, note 14 above, para. 133.

⁵³ *Ibid.*, para. 134.

⁵⁴ *Ibid.*, paras. 177-82.

⁵⁵ Chapter 000 above, p. 00.

Some observers would challenge the very notion that a function performed by a body such as the Committee can be quasi-judicial, arguing that it either is judicial or it is not. But this is not the place to engage in such semantic (or alternatively foundational) questions. Suffice it to say that the term 'quasi-judicial' must mean that at least some of the essential elements of judicial decision-making are present.⁵⁶ In the case of the Committee, neither the assumptions which apply when electing the experts, nor the consequences that attach to a failure to abide by the Committee's conclusions, would seem to possess the hallmarks of a judicial process. Similarly, an analogy might be drawn in other respects to the role of the UN's Human Rights Committee (HRC) which examines reports submitted by states under the International Covenant on Civil and Political Rights (ICCPR). As McGoldrick concluded in that respect:

Having regard to the absence of any judicial determination, binding decisions or recommendations, and enforcement powers it is apparent that the key to the effectiveness of the reporting procedure established by the ICCPR will be the HRC's powers to persuade.⁵⁷

Similarly, a former President of the Committee has noted that '[t]he ECSR is not a judicial body, certainly not in the strict sense'. He added that this is precisely the reason why various proposals have been made to incorporate social rights into the European Convention on Human Rights and to establish a European Court of Social Rights.⁵⁸

It must be conceded, however, that a plausible counter-argument could be mounted to the effect that the ECSR does behave judicially to the extent that it considers both sides of the question when examining compliance, confines itself to applying the applicable legal norms to the facts before it, and formulates its reasoned views in a judicious fashion. And, it might be added, at least some of those involved in the procedure aspire to make it increasingly more judicial in nature.

On balance, however, it is difficult to conclude that a body which operates as this one does, which relies heavily upon sets of draft conclusions prepared by a full-time staff rather than undertaking its own analyses from scratch,⁵⁹ and whose recommendations need are subject to a form of review by the Committee of Ministers, is primarily a quasi-judicial one when performing its reporting function. More importantly, it can be argued that it is counter-productive to characterize it in this way since its methods of work and

⁵⁶ One definition of 'quasi-judicial' notes that:

[B]etween routine government policy decisions and the traditional court forums lies a hybrid, sometimes called a "tribunal" or "administrative tribunal" and not necessarily presided by judges. These operate as a government policy-making body at times but also exercise a licensing, certifying, approval or other adjudication authority which is "judicial" because it directly affects the legal rights of a person.

Duhaime's Online Legal Dictionary, available at <http://www.duhaime.org/dictionary/dict-qr.aspx>

⁵⁷ D. McGoldrick, *The Human Rights Committee* (Oxford, Clarendon Press, 1994) 55.

⁵⁸ Evju, note 4 above, 22-23.

⁵⁹ It seems that the examination of state reports is undertaken primarily by the Secretariat and, while there is every opportunity for inputs by the expert members, the great majority of the findings are those first flagged by the Secretariat. In this respect the procedure is faithful to the ILO model, on which it was originally largely based.

general approach are then less likely to be framed so as to take full advantage of those techniques and functions which might be appropriate to a monitoring body but not to one which aspires to be seen in judicial terms. The type of functions that might be performed by a monitoring body can be illustrated by reference to the list of seven objectives identified by the UN Committee on ESCR in relation to its reporting procedure. It suggested that the process should be designed: (i) to ensure that a comprehensive initial review is undertaken of national legislation, administrative rules and procedures, and practices; (ii) to ensure regular monitoring of the situation by the state party in relation to each of the rights; (iii) to encourage a process of ‘principled policy-making’ on the part of the government; (iv) to facilitate public scrutiny of relevant government policies; (v) to provide a basis on which both the government and the Committee can evaluate progress over time; (vi) to enable the government to acknowledge the problems it faces in meeting its obligations; and (vii) to enable the Committee to develop a better understanding of the common problems faced by States in relation to these rights.⁶⁰

The proposals that follow in relation to enhancing the effectiveness of the ESC system draw upon the assumptions underpinning that model of the roles which should be played by a reporting procedure at the international level. The situation is, of course, different in relation to the collective complaints procedure which is also briefly addressed below.

6. Enhancing the Effectiveness of the ESC System

Critiques of the shortcomings of the ESC’s monitoring arrangements are hardly new. Five years ago Andrew Drzemczewski identified what he termed its ‘four major weaknesses’ in the following terms: ‘its heavy and slow procedure, uncertainty as to the respective roles of the Committee of Independent Experts and of the Governmental Committee, the absence of actual participation of the social partners in the supervisory procedure, and the lack of any significant political sanction as the outcome of the procedure’.⁶¹ The case study contained in the present chapter serves both to illustrate the ways in which these shortcomings affect the procedure and to demonstrate that most of the weaknesses endure. In this final section of the chapter an effort is made to suggest ways in which the system could be strengthened so as to mitigate the impact of the relevant structural defects and to take action in areas in which the Council of Europe or the ECSR retains a degree of initiative or discretion which could be used to strengthen the procedures.

A. The Status of the Charter in National Law

The starting point for most international human rights monitoring mechanisms is the assumption that the principal level of engagement is at the national level and that the international level is no more than a complement or catalyst to national action. This serves to highlight the importance of ensuring that the ESC is given appropriate status

⁶⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 1 (1989): Reporting by States parties, UN doc. HRI/GEN/1/Rev.7 (2004), p. 9.

⁶¹ A. Drzemczewski, ‘Fact-finding as Part of Effective Implementation: The Strasbourg Experience’, in A. Bayefsky (ed.), *The U.N. Human Rights Treaty System in the 21st Century* (The Hague, Kluwer, 2000) 115 at 130.

within the domestic law of the states parties. Yet one of the conclusions that emerges from various of the chapters contained in the present volume⁶² is that the present situation in this regard is far from optimal. One conclusion to be drawn from this observation is that the Committee itself might devote more attention and effort to encouraging governments to ensure that the Charter does have a meaningful role within the national legal system. This is an element to which the UN Committee on ESCR paid particular attention in one of its early General Comments.⁶³

B. The Composition of the Committee

One of the largely unspoken issues in relation to the ECSR relates to its composition. Although the Charter was originally cast in broad terms, it was designed on the basis of very significant inputs from the ILO, and in many respects followed a labour rights model. Indeed, an ILO representative was long accorded a uniquely important role in the work of the Committee's predecessor. Unsurprisingly, the majority of the experts who have served on the Committee have been labour law experts. The Charter's scope was significantly extended by the Additional Protocol of 1988 and in the revised (consolidated) Charter of 1996. As a result of these changes the narrowly defined labour rights component of the Charter was diluted and an expanded range of social rights matters, more broadly defined, brought within the remit of the Charter.⁶⁴ The predilection for labour lawyers continues to apply despite the expansion of the scope of the Charter and the fact that the regime now aspires to play a broad-ranging role in relation to social rights.

As the labour rights dimension becomes less important because of the strong influence of the European Union in that area, even on the standards followed by non-Member States, the Committee will need to develop a broader base and draw upon professional constituencies reaching well beyond the labour law field. Labour unions should not necessarily be the principal interlocutors, labour law should not necessarily define the target groups and labour lawyers should not dominate the jurisprudential debate over the interpretation of the Charter. While governments will need to respond by nominating a more diverse range of candidates for election to the Committee, the role of civil society is also of particular importance in ensuring that the nomination process at the national level yields qualified nominees reflecting diverse fields of expertise.

C. Reaching out to Civil Society

In relation to social development policy in general it has been argued that:

⁶² See especially the chapters by C. Fabre, G. Gori and M. Bell.

⁶³ General Comment No. 9 (1998): The Domestic Application of the Covenant, UN doc. HRI/GEN/1/Rev.7 (2004), p. 55.

⁶⁴ It should be noted here that there is a continuing terminological debate within Europe as to the proper scope to be accorded to labour rights and the extent to which that category can or should be interpreted broadly so as to encompass a range of social rights. See e.g. the comment that identifying the labour law aspects of the EU Charter of Fundamental Rights is 'not necessarily an easy task' since it might include 'only the rights dealing with employment relationships' or might extend to a much broader range of social rights. Pascale Lorber, 'Labour Law', in S. Peers and A. Ward (eds.), *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart, 2004) 211.

A social rights perspective needs to continually move between micro-, meso- and macro-levels so that the links between issues of governance, provision, innovation, access and voice are continually addressed.

Perhaps above all, partnerships for social justice cannot be technical but, rather, must involve attention to power issues. In this way, allies can be found ...⁶⁵

Such an analysis is entirely consistent with the vision suggested above of the ECSR as playing the role of a catalyst, rather than that of a primary or principal actor. It follows that it is important for the Committee to reflect on its current or potential relationships with other actors and its ability to mobilize, inform, assist and work with them. In this respect, civil society has proven to be the key ally of most international human rights bodies, yet it has not featured prominently in any dimension of the work of the ECSR.

There are many options available to the Committee to correct this self-defeating approach. One is to suggest that national NGOs be given a stake in the process by either encouraging governments to give them a role in the preparation of the report (as some have advocated, but which I consider to be unrealistic in practice) or, more feasibly and more conceptually defensible, by alerting the key NGO groups at the national level to the fact that the report has been prepared and soliciting a separate and critical response to it (an alternative report as they are sometimes called in the UN context). Under the ESC, Governments are supposed to disseminate the reports and to consult but it seems that such practices are not very common, at least in a meaningful sense. In the case of the Committee on the Rights of the Child, and to a lesser extent some of the other UN human rights treaty bodies, the dissemination of government reports and the preparation of alternative reports have facilitated a significant mobilization of civil society and ensured an important alternative input into the international supervisory process.

Another option is to give national NGOs some more direct role, either in relation to the actual examination of the report, or in following up on the recommendations that emerge from the process of examination. But the picture that emerges from the Italian case study is somewhat dispiriting in this respect. The views of the key domestic players were not solicited in a meaningful way,⁶⁶ the relevant information they generated was barely taken into account, and the issues of most concern to them were not necessarily even addressed by the Committee. There are many creative ways in which the Committee could expose itself to the sunlight of civil society if it so chose and such a move would have the potential to transform the minimalist and rather bureaucratic profile currently adopted in this respect into one which would demand and warrant the attention and energies of civil society.

D. Reaching out to Other Key Institutional Actors

⁶⁵ Peter Stubbs, *International Non-State Actors and Social Development Policy*, Globalism and Social Policy Programme, Policy Brief No. 4 (2003) 8.

⁶⁶ Some letters seeking further information were sent, but apparently rather few. The resulting impression seemed most unlikely to stimulate and particular sense that it is worthwhile to contribute or to seek to participate in the process.

The future of the ESC is, to a significant extent, inextricably linked to the approach and the fortunes of two other organizations – the ILO and the EU – and it will need to re-evaluate and recalibrate its relationship with each in the years ahead.

Its close relationship with the ILO stems, as noted above, from the largely ILO-derived nature of many of the Charter's standards. As Stein Evju, a former President of the European Committee of Social Rights, has noted, the 1961 Charter was 'inspired by and patterned on ILO conventions and recommendations in the field of social and economic rights'. In his view, even the new standards adopted in the 1990s 'are not novel inventions by the Council of Europe but draw, largely speaking, on corresponding, more recent ILO instruments and, in part, on EU directives'.⁶⁷ To the extent that the ESC provisions track the traditional approach of the ILO, the ECSR will need to take account of the fact that the ILO itself has, since 1998, opted to devote much of its effort to a very different approach which reflects flexible standards, a greatly diminished emphasis on centralized supervision, and considerably more deference to national preferences.⁶⁸ As this approach takes up more and more of the labour standards-related energies of the ILO, the ESC approach will risk becoming anachronistic and being painted as rigid and poorly adapted to the demands of a globalised economy, unless the ECSR explicitly addresses the resulting challenges.

In terms of the EU, there is little to indicate that the relationship between the impact of the EU Charter of Fundamental Rights on the ESC has been given the attention it would warrant within the Council of Europe.⁶⁹ While commentators have long urged that the EU should accede to the ESC,⁷⁰ there is little reason to think that the EU will proceed down that path given the contentious nature of economic and social rights in that context and the reluctance of EU governments and institutions to submit themselves to external scrutiny when alternatives can be devised which keep the decision-making within the family. If this (hopefully over-pessimistic) prediction is correct then it means that the ESC runs a strong risk of marginalization unless it is able, through force of reasoning and promotional initiatives, to compel the EU to pay attention to its jurisprudence and treat it

⁶⁷ Evju, n. 4 above, p. 20.

⁶⁸ See Philip Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime', 15 *European Journal of International Law* (2004) 457; and Philip Alston and James Heenan, 'Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work', 36 *New York University Journal of International Law and Politics* (2004) 221.

⁶⁹ See Philip Alston, 'The Contribution of the EU's Fundamental Rights Agency to the Realisation of Economic and Social Rights', in P. Alston and O. de Schutter (eds.), *Monitoring Fundamental Rights in the EU: The contribution of the Fundamental Rights Agency*, (Oxford, Hart, 2005) 159.

⁷⁰ See P Alston and J H H Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', in P Alston, with M Bustelo and J Heenan (eds), *The European Union and Human Rights* (Oxford, Oxford University Press, 1999) p 32; and Olivier de Schutter, *L'adhésion de l'Union européenne à la Charte sociale européenne révisée*, European University Institute Working Paper LAW No. 2004/11.

as a relevant reference point for determinations relating to the EU Charter.⁷¹ Indeed, it is significant that Evju observes in relation to the EU that ‘where the two systems diverge, the [ESC] will clearly suffer’.⁷²

The same point has been made by Churchill and Khaliq in their analysis of the collective complaints procedure. They urge the ECSR to promote compatibility between the standards they define under the ESC and those reflected in the EU and elsewhere. In their view, such an approach ‘is more likely to mean that [the Committee’s] findings will not be ignored because similar breaches under other treaties are more likely to be enforceable, especially in the case of EU law.’ They concede, however, that such an approach increases the ‘risk that the ECSR may need to water down its approach to the obligations imposed by certain Charter provisions, thus to some extent defeating the object of the exercise.’⁷³

The first step towards finding a solution lies in acknowledging the problem. The ECSR needs to recognize that in some areas it is operating under the shadow of the EU, that its best hope is to seek to collaborate and interact, and that this will involve a systematic effort to shape compatible jurisprudence and to develop presidential dialogue with the key institutions including the Commission, and the European Court of Justice.

E. Making Inputs and Outputs Accessible

The ESC is close to being a disaster area when seen from a public relations perspective. It must suffice for present purposes to note several dimensions of this problem. The first is obvious, but has no simple solution. It is that the complex system resulting from the combination of the *à la carte* range of rights to which states subscribe and the complex set of texts which result from the efforts to update and revise the Charter almost guarantee that only the most dedicated and skilled of observers will be able to navigate their way through the labyrinth that has been created. As a result, the Charter’s potential to resonate easily with the broader public is close to zero. But instead of leading to resignation this should lead to steps designed to make the process more accessible and comprehensible. In the first place the format of the Committee’s current reports is badly in need of improvement. The existing format is about as unappealing as it possibly could be and an effort should be made to make them more user friendly.

Secondly, the jurisprudential contributions developed by the Committee need to be made more obvious and accessible. At present they too often remain buried deep in verbiage. The formal output of the Committee’s procedures provides useful grist for the academic mill but little material in a form likely to be picked up by civil society, national courts, or legislators. The point has been made in more gentle terms by Harris and Darcy who

⁷¹ For a detailed analysis of this issue see Jean-François Akandji-Kombé, ‘Charte sociale et droit communautaire’, in Jean-François Akandji-Kombé and Stéphane Leclerc (eds.), *La Charte sociale européenne* (2001) 149.

⁷² Evju, n. 4 above, p. 32.

⁷³ Robin R. Churchill and Urfan Khaliq, ‘The Collective Complaints System of the European Social Charter – An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’, 15 *European Journal of International Law* (2004) 417 at 456.

observe that ‘the Committee has not articulated in general terms the principles that it applies; instead they are usually mostly to be inferred from its rulings on ... particular situations ...’.⁷⁴ Thus, for example, the recent breakthroughs on the right to housing and the right to environment mentioned in the chapter in this volume by Brillat⁷⁵ are at best barely visible to most observers. While the UN human rights treaty bodies have made very effective use of the technique of adopting General Comments, the ECSR has failed to devise any equivalent means by which to distil and highlight the interpretations of specific rights which they have adopted. The introduction to the annual report would provide an appropriate opportunity for the Committee to highlight its contributions in this regard. This is a technique generally used by the ILO Committee of Experts and one which has been tried but not pursued by the ECSR. It should be revived and developed.

Thirdly, the Committee needs to pay more attention to the ways in which its conclusions are presented and disseminated. The response of the media, of specialist civil society groups, and of the general public which emerges from the Italian case study is not encouraging in this respect. The Committee’s recommendations were not taken up with any notable enthusiasm by civil society even when they were critical of the government and were supportive of positions which civil society had been at pains to push at the national level. The Committee needs to be able to translate its conclusions from legalese into everyday discourse and to find ways to disseminate the conclusions which will reach (and more importantly, touch) the general public.

F. Holding Governments to Account

The number of unanswered issues, leading to a large proportion of matters deferred for consideration in the next report, is a sign that the process is not working optimally, especially in the days of internet and video-link communication. To say that issues will, in effect, be deferred for five years is not a sign that opportunities provided by new technologies are being exploited. Nor is it likely to inspire civil society to engage actively when governmental failures to provide information are rewarded so handsomely.

The role still accorded to the Committee of Ministers in the overall ESC supervisory system is a strong reminder both of the fact that governments remain extremely sensitive in relation to social rights and that the autonomy accorded to the European Court of Human Rights under the Protocol 11 reforms is a far cry from the continuing second-guessing role retained by governments under the ESC system. Thus, for example, in relation to the complaints procedure, Churchill and Khaliq have observed of the Committee of Ministers that:

While it has generally acted speedily, its handling of those complaints where the ECSR has found non-compliance with the Charter by the defendant State has been quite unsatisfactory. ... If [the present trend] continues, it will serve only to discredit the system and discourage complaints because complainants will feel

⁷⁴ Harris and Darcy, n. 5 above, p. 31.

⁷⁵ Chapter 000 above.

that there is little point in utilising the system if a finding of non-compliance by the ECSR will not be endorsed ...⁷⁶

G. The Importance of the Collective Complaints Procedure

The most significant innovation in the ESC system in recent years was the adoption of the collective complaints procedure. In the seven years since the first complaint was lodged the balance sheet offers a mixed picture. On the one hand the fact that a complaints procedure has been introduced in relation to social rights constitutes a major breakthrough in terms of the general resistance of governments to submit such matters to international adjudication of any sort. The fact that 25 complaints have been registered between October 1998 and February 2005 is not insignificant given the stakes that are involved in some of the cases. And the preparedness of the ECSR to adopt far-reaching decisions in several cases augurs well for the contribution which the procedure might make in the future.

On the other side of the balance sheet, reference may be made to several less encouraging elements. First, neither national nor international NGOs have yet been sufficiently mobilized to push for acceptance of the complaints procedure by governments. The result is that only 13 states, or less than one-third of the 44 which have signed (34 have ratified) either the Charter or the Revised Charter, have accepted it. Secondly, only one country, Finland, has agreed that complaints can be lodged by its national NGOs (the optional fourth category), rather than requiring the involvement of an international organization of employers or trade unions or a national group certified for this purpose. These restrictions helps to maintain the labour law (or employment rights) orientation of the Charter and hence its limited relevance to many of the major social movements at the national level.

And thirdly, the relative paucity of complaints to date, twenty-nine as of May 2005, is surprising. It would seem to suggest that national social action groups are loathe to confront their governments in an international forum, whether for fear of losing government sympathy or financial support or because national resolution of such issues is seen as the appropriate norm. While the labour movement has made reasonable use of the procedure there is a clear need to encourage the involvement of a more traditional human rights constituency in bringing cases under the procedure.

The bottom line, however, is that the collective complaints system represents an important development in the procedure and one which has the potential to transform the effectiveness of the ESC system as a whole. Because the procedure also has the potential to convince governments that complaints systems in relation to these rights represent a step too far, it is important for the ECSR to tread carefully and to ensure that its case law is strongly reasoned and consistent.

7. Conclusion

⁷⁶ Churchill and Khaliq, note 72 above, at 455.

The picture that emerges of the supervisory system under the ESC, as illustrated by the recent experience in relation to Italy, points to the need for significant reforms to be adopted. The thrust of the present analysis is that the great majority of these reforms are within the grasp of the existing institutions and that a concerted effort by the Council of Europe, and especially by the ECSR itself, could transform a relatively ineffectual system into one that could have a far greater impact.