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PROMOTING EQUALITY THROUGH SOCIAL INCLUSION: CASE STUDIES FROM THE EUROPEAN SOCIAL CHARTER

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There can be little doubt that equality is one of the pivotal labour standards enjoying global recognition. A natural point of reference is the ILO 1998 Declaration on Fundamental Principles and Rights at Work, which included the elimination of discrimination in employment as one of its four strands. In addition, there are a range of UN Conventions which seek to promote equality in the labour market.¹ Although these instruments do not necessarily link equality to sustainable development, it is not difficult to uncover the connections. Societies in which substantial inequalities are permitted to arise and fester are vulnerable to the social tensions which they can produce. At one end of the scale, there is the waste of valuable human resources if certain groups are excluded from the labour market and trapped in poverty and/or dependence on state-provided social welfare. More dramatically, examples abound of situations where these fissures in society eventually erupt with violence and unrest.²

This chapter explores how equality is pursued, comparing two approaches. In Europe, legal responses to inequality have tended to focus on anti-discrimination legislation. This approach attempts to bring about equality by giving individuals a right to challenge discrimination through litigation before courts or other adjudicatory bodies. In contrast, the promotion of social inclusion has been more typically linked with policy-based mechanisms, not amenable to judicial enforcement (Fredman 2008: 177). A dichotomy thus arises between two pathways for advancing equality: anti-discrimination and social inclusion. The chapter begins by reviewing in more detail the characteristics, strengths and pitfalls of each of these two approaches. It then seeks to explore whether these approaches might be brought together and, to this end, it examines the European Social Charter. This appears to marry some of the qualities of both approaches; it is an instrument of international law, yet it has a holistic outlook on social rights and their implementation in practice. In order to make a more concrete assessment of the Charter's potential to promote equality, two discrete case studies are considered, focusing on the social situation of Travellers in Ireland and Roma in Italy.

1. Approaches to the pursuit of equality

A. Anti-discrimination

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¹ E.g. Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination 1965 obliges States to prohibit racial discrimination in areas such as the free choice of employment and just and favourable conditions of work.

² E.g. in the past decade both the UK and France have experienced urban rioting in socially-disadvantaged neighbourhoods with significant ethnic minority populations.

Within Europe, anti-discrimination legislation varies greatly in its contents. This section does not intend to pronounce any ‘universal truth’ about what is, or is not, anti-discrimination legislation, but simply to identify some of its main hallmarks. Probably the most defining characteristic of an approach to equality founded on anti-discrimination is conferring the right on individuals to bring legal challenges to acts of discrimination. This is certainly not the sole dimension of such laws, but it seems to be an irreducible minimum. This reflects a rights-based approach to equality; individuals have a right to be free from discrimination and hence there should be a legal procedure through which they can challenge its occurrence and, ultimately, receive effective redress (such as annulment of the original act of discrimination, or compensation from the discriminator). The anti-discrimination approach endeavours to empower individuals and implicitly seeks broader social change through the spill-over effects of individual cases. This can arise because of the educative function of litigation; cases elucidate how legal concepts materialise in everyday workplace practice, bringing to life abstract notions such as direct or indirect discrimination. Case-law, and its media reporting, can also exercise a deterrent effect, raising awareness amongst employers and the general public about the legal prohibition of discrimination.

Notwithstanding these salutary qualities, experience with the anti-discrimination approach has exposed some of its shortcomings. Individuals encounter a range of legal and practical obstacles which can deter them from bringing cases. Accusations of discrimination are highly sensitive in today’s workplace and they are likely to be met with considerable resistance.³ As Fredman has observed, litigation becomes embroiled in retrospective fault-finding and the attribution of responsibility to specific individuals (Fredman 2002: 177), rather than seeking to prevent inequalities or to identify those actors in a position to advance equality. Litigation-based approaches have also tended to become focused on an individualised analysis of discrimination, dissected from the socio-economic context within which inequalities breed. Considering the situation of Roma in Europe, there is abundant evidence of disadvantage in multiple sectors of life: housing, healthcare, education and the labour market (European Commission 2004a). Anti-discrimination litigation can be a valuable tool in tackling a specific instance of discrimination against Roma people, for example, where Roma job applicants are turned away because of their ethnic origin. Yet such litigation tends to scrape the surface of inequality, dealing with the symptoms but struggling to find a remedy for the underlying causes. Disadvantage in the education system means that many Roma possess fewer formal educational qualifications than their non-Roma counterparts. Even if there was no direct discrimination in the recruitment process, the legacy of educational disadvantage implies that employers will often prefer non-Roma candidates on the basis of ‘merit’, that is, better qualifications.

³ Research by the former Department of Trade and Industry showed that employers were more likely attend Employment Tribunal (ET) proceedings under the Race Relations Act 1976 than under any other type of discrimination or employment litigation. In a sample of around 500 cases, the employers attended ET hearings in 96% of RRA cases: Peters et al (2006).

The anti-discrimination approach has evolved over time and it increasingly engages with the need to tackle structural forms of disadvantage. The concept of indirect discrimination can be used to unpick disadvantage that flows from organisational culture and practices which, on the face of it, appear to apply equally to all persons. A notable example is *DH v The Czech Republic*.⁴ In this case, children were allocated to special schools for those with learning disabilities on the basis of supposedly-neutral psychological tests. In practice, Roma children in the town of Ostrava were 27 times more likely to be allocated to such schools than a similarly situated non-Roma child. Crucially, the European Court of Human Rights held (at para. 209) that it was not necessary to show that any individual Roma child had been subject to prejudicial treatment in the conduct of the tests. The ‘disproportionately prejudicial effect on the Roma community’ was sufficient evidence to support a finding of unlawful discrimination. Whilst such litigation illustrates the potential of anti-discrimination law to expose those practices which perpetuate inequality, it simultaneously imposes significant constraints on the tools available to remedy past and ongoing disadvantage. Compensatory measures, labelled ‘positive action’, are foreseen in EU anti-discrimination legislation, as well as in the national legislation in most EU Member States. (See further de Schutter 2007: 757.) These have, though, traditionally halted at the point of selection for employment. In its case-law on gender equality, the Court of Justice has repeatedly rejected the notion that overcoming historic under-representation of women in the labour market might entail preferential treatment in selection for employment (de Schutter 2007: 801). Even if there seems little appetite in Europe to pursue strong forms of positive action, such as job quotas, perhaps the deeper impact of anti-discrimination legislation is to create a legal climate which is suspicious of group-specific measures. The symmetrical nature of most anti-discrimination legislation implies that providing specific advantages for Roma persons runs the risk of legal challenge from the non-Roma who are excluded.

B. Social inclusion

The parameters of ‘social inclusion’ as an approach to pursuing equality are less defined than the anti-discrimination approach. Within Europe, social inclusion has emerged as a successor to what might previously have been described as ‘anti-poverty’ policy (Schoukens and Carmichael 2001: 76). The term was popularised within EU discourse after the creation in 2000 of a policy coordination process on ‘social inclusion’ (Ferrera et al 2002). As a concept, the following definition of social *exclusion* provides an insight into what social *inclusion* seeks to overcome:

Social exclusion is a process whereby certain individuals are pushed to the edge of society and prevented from participating fully by virtue of their poverty, or lack of basic competencies and lifelong learning opportunities, or as a result of discrimination. This distances them from job, income and education opportunities as well as social and community networks and activities. They have little access to power and decision-making bodies and thus often feeling [sic] powerless and unable to take control over the decisions that affect their day to day lives. (European Commission 2004b: 10)

⁴ *DH and others v The Czech Republic* [GC] (2008) 47 EHRR 3.

A number of characteristics emerge from this definition. First, social inclusion adopts an open and holistic perspective on inequality. The interaction of disadvantage in spheres such as housing, education and employment is recognised from the outset. As mentioned above, this contrasts with the blinkered vision imposed within litigation processes, where the emphasis is normally on a sole dimension of inequality, such as denial of employment. Indeed, anti-discrimination legislation often carefully circumscribes its material scope meaning that only those inequalities falling within the remit of the law can be effectively addressed.

A second characteristic of social inclusion is its blended approach to socio-economic inequality (poverty) and discrimination. Social inclusion differs from anti-poverty policy insofar as it broadens its horizons beyond relative income levels. It acknowledges that socio-economic disadvantage is not solely located in low income; rather, it is interlinked with other factors leading to marginalisation. Even those enjoying stable work and adequate incomes can encounter social exclusion within the labour market if they are segregated into certain occupational sectors or driven into self-employment. One of the shortcomings of the anti-discrimination approach is its tendency to render socio-economic inequalities invisible. Neither the European Union, nor the Council of Europe, have expressly recognised socio-economic status as a protected ground of discrimination within their legal frameworks. Instead, the emphasis has been on sources of collective identity, such as gender and ethnicity. This downplays the correlation often found between socio-economic status and such characteristics. In relation to Roma communities, there is a particularly acute relationship between poverty and ethnicity.⁵

A third distinction between social inclusion and anti-discrimination lies in the instruments used within each approach. Social inclusion generally falls under the category of ‘policy’, implying a relative absence of legally-enforceable norms. Although anti-discrimination is not exclusively pursued through law, legislation and litigation have tended to occupy centre-stage. It would be a mistake, however, to equate the policy/law dichotomy with weak/strong interventions. Social inclusion policy has much less reticence about redistribution of resources from the advantaged to the disadvantaged, and it does not endeavour to be even-handed in its approach (Collins 2003: 22). Measures such as subsidies for employing the long-term unemployed, state-sponsored apprenticeships or even preferential access to employment in the public service are not vulnerable to litigation claiming that they discriminate against those who are socio-economically advantaged.

Although the policy terrain seems more focused on achieving certain outcomes (for instance, reduced long-term unemployment) than the anti-discrimination approach, a corollary of this may be this disempowerment of individuals. By eschewing legal remedies, the social inclusion approach implicitly rejects complaints mechanisms with

⁵ The overlaps between socio-economic disadvantage and membership of the Roma community are highlighted in *European Roma Rights Centre v Bulgaria*, Complaint No. 48/2008, 18 February 2009. In this case, the European Committee of Social Rights was divided on whether restrictions on unemployment benefits should be characterised as direct discrimination based on socio-economic status or indirect discrimination against Roma.

the consequent sidelining of courts. The policy prescription seems reliant on initiatives taken from above, whereas one virtue of the anti-discrimination approach is the potential for individuals to provoke change by mounting a legal challenge to the specific discrimination which they have encountered. In the *DH* case (discussed above), a wide range of initiatives by the Czech Republic to reduce the segregation of Roma children in schools were mentioned by the state in its defence (see paras 65-79), but the factual circumstances confronted by the children in that case provided a graphic illustration that these measures were not sufficient. Cases such as *DH* more generally expose the difficulty in measuring progress and effectiveness within the social inclusion approach. The absence of courts renders it difficult for individuals or civil society to compel states to take action. They must therefore fall back on political campaigning and persuasion; yet the political leverage of socially excluded groups is inherently likely to be limited. This is especially true in relation to Roma communities, where high levels of public antipathy can be encountered, as well as anti-Roma populism within politics and the media.

2. *The European Social Charter*

The discussion above has identified some of the main differences between an approach to equality based on anti-discrimination or social inclusion. Both offer potential, whilst each contains its own internal weaknesses. Nevertheless, the two approaches often remain rather isolated from each other. Within European Union law and policy, for example, there is both an elaborate framework of anti-discrimination legislation and a policy coordination process focusing on social inclusion. There is, though, relatively little evidence of cross-over or interaction between the two.⁶ Against this backdrop, the European Social Charter warrants further scrutiny because it has attempted to integrate both approaches.

The Charter is an instrument of the Council of Europe and it guarantees a broad swathe of social rights in fields such as employment, education, healthcare and housing. The original 1961 Charter was more heavily focused on labour market rights, but a revised Charter agreed in 1996 expanded its horizons to embrace a wider range of social rights. The Charter has two mechanisms to oversee its implementation within the Contracting States. First, there is a duty on states to report on their implementation of the Charter. Reports are submitted on an annual basis, but there is a four year thematic cycle of reporting, so that different parts of the Charter are monitored at intervals. A *legal* assessment of whether the state has complied with the Charter is then made by the European Committee of Social Rights (ECSR). The following-up of these assessments (called ‘Conclusions’) is the responsibility of *political* bodies. Initially, the Conclusions of the ECSR are considered by the Governmental Committee, composed of one representative from each of the states who are party to the Charter. The final step is for the Governmental Committee to ask the Committee of Ministers to make a recommendation to the state concerned. The Committee of Ministers is comprised of the

⁶ eg in the first EU joint report on social inclusion in 2002, the section on ‘access to rights’ discussed combating discrimination without mentioning the EU anti-discrimination Directives adopted in 2000: European Commission 2002: 53.

Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg, so it represents high level political engagement.

The second mechanism for monitoring enforcement of the Charter is a collective complaints procedure. This allows a limited range of organisations, such as trade unions and listed international NGOs, to bring a complaint that the state is in breach of the Charter. The complaints are adjudicated by the ECSR. This dual enforcement structure means that the Charter combines programmatic oversight with the possibility for complaint-based litigation. Although 43 states have ratified either the 1961 or 1996 Charter, only 14 have accepted the collective complaints procedure. Both of the case studies selected involve countries which adhere to the 1996 Charter and the collective complaints procedure.

In principle, the Charter holds considerable potential for an effective joining of the anti-discrimination and social inclusion approaches. Reflecting the social inclusion approach, the ECSR has regularly emphasised that it looks to see that rights are guaranteed not only in law, but also in practice.⁷ For example, it routinely collects data from states on topics such as the labour market situation or the utilisation of government programmes. Such analysis illustrates that the outlook of the Committee is broad and often more wide-ranging than the typical purview of courts. There are, though, elements of the Charter which are consistent with the anti-discrimination approach. Notably, the Revised Charter includes a horizontal non-discrimination clause (Article E) and the case-law under the collective complaints procedure frequently concerns claims of discrimination in national law and policy. Although the Committee's assessment is devoted to an analysis of the general situation, evidence of individual cases is sometimes advanced within the collective complaints procedure as a means of establishing the overall picture.⁸

Given the diversity of states and social rights covered by the Charter, it is beyond the confines of this chapter to make a generalised assessment of its effectiveness. In order to shed some light on how it functions in practice, two discrete case studies have been chosen, focusing on the social situation of Travellers in Ireland and Roma in Italy. This seemed an apt topic for investigation. 'Roma' is an umbrella term that stretches across a multiplicity of diverse social groups, each with its own cultural and historical background. As a label, it may be understood differently when used in the national or European context. From a European perspective, the Travelling Community in Ireland fall under the 'Roma' umbrella due to their history of a nomadic lifestyle. In everyday discourse in Ireland, the label Roma is typically reserved for ethnic Roma migrants from other parts of Europe, who are distinguished from the Travelling Community. In contrast, in Italy, Roma is used as a catch-all label to cover groups that have a long history in Italy, as well as more recent migrants. Notwithstanding the differences between the various groups, there is a clear pattern of socio-economic disadvantage that makes these cases

⁷ E.g. *Mental Disability Advocacy Centre v Bulgaria*, Complaint no. 41/2007, 3 June 2008, para 38; *International Movement ATD Fourth World v France*, Complaint no. 33/2006, 5 December 2007, paras 59-61.

⁸ *International Movement ATD Fourth World v France*, Complaint no. 33/2006, 5 December 2007, paras 52-53.

suitable for comparison. Already in 1993, the Parliamentary Assembly of the Council of Europe adopted a Recommendation identifying Gypsies as ‘a true European minority’, whilst recognising that they lived in a ‘deplorable situation’.⁹ Ten years later, a study published by the European Commission concluded that ‘many Romani communities are uniquely exposed to the forces of social exclusion’ (European Commission 2004a). It would, therefore, be reasonable to expect that this topic is germane to the implementation of the European Social Charter.

3. Ireland

The Travelling Community is an indigenous ethnic minority group in Ireland. There are estimated to be around 20-27,000 Travellers in Ireland (European Commission 2006: 101-2). The 2006 census revealed that, of those in the labour force, the unemployment rate for Traveller men was 76% and 73% for Traveller women.¹⁰ The social situation of Travellers in Ireland has been on the radar of the ECSR for some time. In 2003, the Committee asked Ireland to report on the extent of accommodation available for Traveller families, in its remarks under Article 16 on the right of the family to social, legal and economic protection.¹¹ The following year, the Committee noted that this information was still missing and reiterated its request.¹² In 2005, no conclusions on any topic could be reached by the Committee as Ireland failed to submit its annual report.

In 2006, the issue of the rights of Roma under Article 16 assumed a higher profile across the entire reporting exercise. This was stimulated by the Committee’s first decision in a collective complaint concerning Roma. In *European Roma Rights Centre (ERRC) v Greece*,¹³ the Committee held that Greece had violated Article 16 in relation to the shortage of permanent housing for Roma, the lack of temporary stopping facilities and the manner in which forced evictions were conducted. In the course of the decision, the Committee indicated (at para. 19) that it viewed the goals of social inclusion and equality as inextricably linked:

States must respect difference and ensure that social arrangements are not such as would effectively lead to or reinforce social exclusion. This requirement is exemplified in the proscription against discrimination ...

The Committee chose to highlight this decision in its ‘General Introduction’ to its 2006 conclusions, indicating that comprehensive information would be sought from all states on ‘nomads’ as a particularly vulnerable group.¹⁴ In relation to Ireland, the Committee had received data which indicated that housing provided by local authorities for Travellers had increased in the past three years and it concluded that the situation was ‘satisfactory’. The degree of scrutiny applied to these figures is, though, open to question.

⁹ Recommendation 1203 (1993) on Gypsies in Europe, 44th Ordinary Session.

¹⁰ Central Statistics Office Ireland, ‘Irish Travellers aged 15 years and over classified by principal economic status, age group and sex, 2006’, available at: <<http://beyond2020.cso.ie/Census/TableViewer/tableView.aspx?ReportId=75507>> accessed 6 August 2009.

¹¹ Conclusions XVI-1, Volume 1 (2003).

¹² Conclusions 2004 (Ireland), Article 16.

¹³ Complaint No. 15/2003, 8 December 2004.

¹⁴ Conclusions 2006, Volume 1, para 34.

The data reported that 6,991 Travellers were in housing of all types during the relevant period. Whilst this may have represented an increase, it remains well below the total estimated Traveller population.¹⁵ Indeed, the issues raised in *ERRC v Greece*, such as insufficient temporary halting sites, have familiar echoes of the controversies that often surround the Travelling Community in Ireland.

The 2006 report is the first occasion where the Committee starts to consider Travellers beyond the sphere of housing rights. It requested that Ireland submit a more detailed analysis of unemployment rates for ethnic minorities.¹⁶ Whilst noting that domestic legislation prohibits discrimination in employment on grounds of, *inter alia*, membership of the Travelling Community, the Committee held that the legislation was not in conformity with the Charter because it includes a pre-defined upper limit on the amount of compensation that can be awarded. The Committee views such limits as inconsistent with the need for damages to be commensurate with the loss suffered.¹⁷ This finding of non-compliance with the Charter was referred to the Governmental Committee and, in 2007, it formally requested Ireland to bring its legislation into conformity with the Charter.¹⁸ Nevertheless, 2008 witnessed another failure by Ireland to submit any report to the ECSR, so no conclusions could be issued.¹⁹

The relative paucity of information in relation to this case study tells its own story. During the past five years of monitoring (2003-2008), the Committee has gently probed into the situation regarding the social and labour market situation of Travellers. Ireland's response could be characterised either as neglect or disdain. By repeatedly failing to submit information, the monitoring function of the Committee was effectively frustrated. In the one instance where a clear finding of non-compliance was issued, Ireland demonstrated a casual disregard for the subsequent procedure. When asked to respond to the finding before the Governmental Committee, the written submission was simply a reproduction of a guide on the internet to making a complaint under the Employment Equality Acts.²⁰ This document did not even attempt to engage with the substantive issue, which was the adequacy of the remedies for discrimination in employment. Needless to say, Ireland has yet to make any amendment to the legislation in order to address the finding of the ECSR or the request from the Governmental Committee.

4. Italy

Estimates vary, but in 2006 it was reported that there are around 85-120,000 Roma living in Italy (European Commission 2006). This is an internally diverse population split

¹⁵ Conclusions 2006 (Ireland), Article 16.

¹⁶ Conclusions 2006 (Ireland), Article 1, para 1.

¹⁷ Conclusions 2006 (Ireland), Article 1, para 2.

¹⁸ Governmental Committee of the European Social Charter, 'Report concerning Conclusions 2006', T-SG (2007) 11, 19 July 2007, para 34.

¹⁹ Conclusions 2008 (Ireland).

²⁰ The document submitted by Ireland (Governmental Committee 2007) matches a guide produced by the Equality Tribunal, available at:

<http://www.equalitytribunal.ie/uploadedfiles/AboutUs/EE1_Making%20Complaint.pdf> accessed 3 August 2009.

between those who are Italian citizens and historically resident in Italy, and those who have migrated to Italy in recent years, from the Balkans and Romania in particular. Unlike the tentative engagement described in the Irish case study, the issue of Roma rights in Italy has been the subject of extensive discussion within the Charter mechanisms. A key milestone was the collective complaint brought against Italy by the ERRC. This focused on the right to housing under Article 31 of the Charter, as well as Article E on the right to non-discrimination.²¹ In brief, the ERRC presented evidence that Italy had a policy of housing Roma in camps with very poor living conditions. The camps often lacked basic amenities, such as water or sewage facilities. Where Roma resorted to unauthorised settlements, these were subject to forced eviction with inadequate procedural safeguards, accompanied by destruction of personal property and violence by law enforcement officers.

In approaching the right to housing, the Committee explained its starting point (at para. 18): ‘the right to housing secures social inclusion and integration of individuals into society and contributes to the abolishment of socio-economic inequalities’. This philosophy tends to ground the interpretation of the Charter in the social inclusion approach. Although the complaint relates to a specific ‘identity group’ (Roma), the Committee identified the link with poverty. It does not pursue a traditional discrimination analysis; there is no search to discover how an appropriate comparator group would have been treated. Indeed, the Committee (at para. 21) rejected any assumption that the approach to the housing of Roma needs to be measured by equivalent treatment of the non-Roma population: ‘equal treatment implies that Italy should take measures appropriate to Roma’s particular circumstances to safeguard their right to housing and prevent them, as a vulnerable group, from becoming homeless.’ Such an approach focuses on achieving a particular socio-economic outcome, in this case avoiding homelessness. On the facts, the Committee considered a range of empirical evidence from the ERRC concerning the social picture for Roma in Italy overall, as well as some identified instances of forced evictions. Ultimately, it held (at para. 36) that there was a ‘practice of placing Roma in camps’ and breaches of the rights to housing and non-discrimination.

The approach that has evolved for following-up collective complaints is a subsequent Resolution by the Committee of Ministers, accompanied by a statement from the respondent state on the measures it will take to address the decision. In this case, Italy promised to take a range of steps, including adopting a framework law setting out a national strategy on Roma; the addition of Roma to the legally-recognised list of historic minority groups (with associated rights); and the promotion of Roma rights via the National Office against Racial Discrimination.²² On the face of it, this seems to provide an ideal example of how the Charter mechanisms can utilise a complaints-based enforcement model to provoke a ripple of changes that deliver collective benefits. Subsequent events, however, have illustrated the limited capacity of the Charter process to compel states to honour their undertakings.

²¹ *ERRC v Italy*, Complaint No. 27/2004, 7 December 2005.

²² Resolution ResChS (2006) 4 of the Committee of Ministers on Collective Complaint No. 27/2004, 3 May 2006.

The state reporting procedure is the primary mechanism through which the Committee controls whether its decisions on collective complaints have actually been respected. In 2007, the Committee noted that the framework law had still not been adopted and that the measures taken by regional authorities were patchy.²³ In relation to evictions, the Committee sounded its concern at the intention of certain local authorities to close down camps under the auspices of ‘Security Pacts’. Concretely, it pointed out that closing down the camps in Rome was intended to reduce accommodation by 10,000 places, yet there were only 4,000 places in the planned alternative villages. In this period, the Committee can also be seen to widen its scope of inquiry, asking for data on the unemployment rate of ethnic minorities in Italy,²⁴ as well as finding non-conformity with Article 17 on the rights of children because of the low number of Roma children in education.²⁵

The situation changed dramatically after April 2008. National elections resulted in the governing centre-left coalition being replaced by a right-wing coalition which included various parties, such as Lega Nord, notorious for strong anti-immigrant and anti-Roma rhetoric. In May 2008, the government declared a ‘state of emergency with regard to nomad community settlements’, invoking powers under legislation designed to respond to natural disasters.²⁶ Under the state of emergency, a range of new measures were taken including the compulsory fingerprinting of camp residents. This was accompanied by a new wave of camp clearances. Once again, there were reports of forced evictions during the night, destruction of personal possessions and violence by police officers.²⁷ Parallel to the actions by the state, Roma camps were burnt down in attacks in Rome, Naples and Catania.²⁸

Unsurprisingly, this turn of events sparked a response by various international organisations. A fact-finding mission was launched by the High Commissioner on National Minorities and the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (OSCE).²⁹ This concluded that the measures taken were ‘disproportionate’ and ‘fuelled anti-Roma bias’.³⁰ The Council of Europe’s Commissioner for Human Rights has since made two official visits to Italy, finding that ‘the vast majority of Roma and Sinti are in urgent need of effective protection of their human rights, especially their social rights, such as the right to adequate housing and to education, by national, regional and local authorities.’³¹ The

²³ Conclusions 2007 (Italy), Article 31.

²⁴ Conclusions 2006, Volume 1 (Italy), Article 1, para 1.

²⁵ Conclusions 2007, Volume 2 (Italy), Article 17, para 1.

²⁶ For full details, see European Roma Rights Centre and others, ‘Security a la Italiana: fingerprinting, extreme violence and harassment of Roma in Italy’, at 17, available at: <<http://www.errc.org/db/03/4C/m0000034C.pdf>> accessed 6 August 2009.

²⁷ *Ibid.*, 24.

²⁸ *Ibid.*, 29.

²⁹ OSCE, ‘Assessment of the human rights situation of Roma and Sinti in Italy: report of a fact-finding mission to Milan, Naples and Roma on 20-26 July 2008’:

<http://www.osce.org/documents/odihr/2009/03/36620_en.pdf> accessed 6 August 2009.

³⁰ *Ibid.*, 8.

³¹ Commissioner for Human Rights, ‘Memorandum following his visit to Italy on 19-20 June 2008’ CommDH(2008)18, para 44.

Council of Europe's specialist anti-racism body, the European Commission on Racism and Intolerance (ECRI), took the unusual step of issuing a statement criticising 'persistent racist and xenophobic discourse by some Italian politicians, even at the highest levels'.³² Within Italy, however, the national institution for combating racism (UNAR) apparently made no official comment on the developments.³³

Against this backdrop, it is particularly salient to examine how these events were handled within the Social Charter mechanisms. Clearly, the practices occurring in 2008 were precisely the types of conduct which lead to the Committee's 2005 decision that Italy was in breach of the right to housing. Moreover, the Committee's warnings in its 2007 report about the direction that Italian policy was going proved remarkably prescient. In February 2009, it fell to the Governmental Committee to decide what stance to adopt on the Committee's 2007 report. Italy argued that the compulsory fingerprinting and incursions into the camps were designed to improve data collection on the situation of Roma and that they were in fact an appropriate response to calls from the ECSR to improve data on the living conditions of Roma.³⁴ With regard to the earlier commitment to include Roma within the law on historic national minorities, it was stated that this was no longer one of the government's priorities.³⁵ The Governmental Committee accepted Italy's explanations, stating that 'the Committee welcomed the developments occurred [sic] after the reference period' and referred the issue back to the ECSR for the next round of state reporting.³⁶

The handling of the Italian case by the Governmental Committee exposes the risk that the legal standard-setting by the ECSR is undermined by subsequent politicisation. There can be little doubt that Italy has not complied with the 2005 decision in *ERRC v Italy*. Few of the commitments given to the Committee of Ministers have been fulfilled and the situation on the ground has actually deteriorated. It seems doubtful to characterise the compulsory fingerprinting as a legitimate means of equality data collection. The OSCE pointed out that singling out one ethnic group for data collection, in a particularly intrusive manner, could be discriminatory and stigmatizing.³⁷ The practice of forced evictions continues: in July 2009, a camp housing around 140 persons, which had existed for 20 years, was cleared of its residents and destroyed.³⁸

³² Statement of ECRI on recent events affecting Roma and immigrants in Italy, 20 June 2008, 46th plenary meeting.

³³ A search of the website of UNAR on 6 August 2009 did not reveal any press release or statement from the body about the measures taken in 2008. In fact, the most recent annual report from UNAR dated back to 2007. See further: <<http://www.virtualcommunityunar.it/>> and <<http://www.pariopportunita.gov.it/>> (under 'Uffizi e servizi').

³⁴ Governmental Committee, 'Report concerning Conclusions 2007', T-SG (2009) 4, 24 February 2009, para 304.

³⁵ *Ibid.*, para 302.

³⁶ *Ibid.*, para 306.

³⁷ OSCE, 'Assessment of the human rights situation of Roma and Sinti in Italy: report of a fact-finding mission to Milan, Naples and Roma on 20-26 July 2008', 7.

³⁸ *Il Messaggero*, 'La Rustica, sgomberato campo nomadi dopo 20 anni, allontanate 140 persone' (27 July 2009).

In the minutes recording the discussions of the Governmental Committee, it is notable that other states with large Roma populations intervened to support the Italian position. For these states, there may be a political self-interest in avoiding any criticism of Italian policies. Bulgaria, for example, suggested that Italy should be afforded more time to deal with the situation;³⁹ it can hardly be overlooked that in two collective complaints Bulgaria has been found by the Committee to be in violation of the Charter in relation to Roma rights.⁴⁰ Nevertheless, the issue will not disappear from the Charter mechanism. In May 2009, the Centre on Housing Rights and Evictions lodged a new collective complaint alleging violation by Italy of various rights in relation to Roma, including the right to non-discrimination. The complaint covers both the failure to comply with the 2005 decision and especially the government measures taken since 2008.⁴¹

5. Conclusions

In principle, the European Social Charter offers a positive example of how an approach based on social inclusion can enrich the concept of equality with a view to sustainable development. In its interpretation of equality in the context of Roma rights, the Committee starts from the goal of social inclusion and explicitly links this to combating socio-economic inequality. From this standpoint, the Committee does not hesitate to recognise that group-targeted measures are required, and that this may entail treating some groups differently in order to overcome social disadvantage. Indeed, in a decision on housing rights for Roma in Bulgaria, *ERRC v Bulgaria*,⁴² the Committee was willing to impose a duty to take positive action (at para. 42):

the Committee finds that in the case of Roma families, the simple guarantee of equal treatment as the means of protection against discrimination does not suffice ... this means that for the integration of an ethnic minority as Roma into mainstream society measures of positive action are needed.

This approach moves away from the asymmetrical outlook which often typifies anti-discrimination legislation. Another illustration of this tendency can be found in the Committee's approach to eviction from unlawful housing settlements. Whilst not giving an unlimited right to Roma to settle anywhere irrespective of planning laws, the extent to which evictions are viewed as permissible by the Committee is balanced against an analysis of whether adequate alternative housing actually exists (*ERRC v Bulgaria*, para. 54).

The Committee's processes provide an innovative bridge between complaints-based anti-discrimination litigation and social inclusion policy. The collective complaints mechanism allows interested organisations to shine a spotlight on specific equality concerns. These avoid becoming bogged down in the analysis of the factual circumstances of any isolated individual case, but explicitly seek to establish a global

³⁹ Governmental Committee, 'Report concerning Conclusions 2007', T-SG (2009) 4, 24 February 2009, para 301.

⁴⁰ *ERRC v Bulgaria*, Complaint No. 31/2005, 18 October 2006; *ERRC v Bulgaria*, Complaint no. 46/2007, 3 December 2008.

⁴¹ Complaint No. 58/2009, 29 May 2009.

⁴² Complaint No. 31/2005, 18 October 2006.

picture of the real situation. The Committee's approach reveals that it is not merely concerned with what law in the books states (i.e. legislation), but it actively engages with the social reality. Moreover, it does not bind itself with formal rules of evidence and it is willing to accept diverse types of information collected by NGOs. The combination of a complaints forum with the ongoing periodic review should allow for the specific equality issues flagged up via complaints to be then reviewed more systematically through the regular reporting process.

Despite the considerable potential that the Social Charter mechanism holds, the analysis of the two case studies illustrated that it can fail to deliver on this promise. The most obvious conclusion is that the Charter can be rendered ineffective by recalcitrance on the part of the contracting states. The Irish case study showed how a state can, to a large extent, simply ignore the Charter's supervisory bodies and frustrate their work through non-communication. Eventually, political pressure would doubtless build if a recommendation from the Committee of Ministers went without any response, but reaching this point is a slow process. The Italian case study began with optimism; it appeared that the collective complaint would stimulate a revision of national policy. The anticipated measures never came to pass, however, and it was a concrete illustration of the weaknesses within the Charter mechanisms where a government pursues a course of action in evident contrast to the Committee's requirements.

The difficulty in enforcing the Charter is relatively well-known, although it is worthy to note that the case studies confirm a long-held impression. From the perspective of this chapter, it is also significant that labour standards remained in the background in each case study. Given that Travellers and Roma are undoubtedly marginalised within the labour market, it is surprising that there was little evidence of the Committee exploring this dimension to their social situation. On a few occasions, the Committee requested evidence from Ireland or Italy on the labour market situation of ethnic minorities, but these inquiries generated little information and the issue was not further pursued. In this area, the Committee's periodic monitoring has focused on other social rights, notably housing and education. This coincides with, and perhaps reflects, the litigation strategy of the NGOs active in this field. None of the collective complaints relating to Roma rights have dealt with labour market issues and similarly the Roma cases pursued at the European Court of Human Rights have so far focused on access to education,⁴³ as well as violence against Roma.⁴⁴ The low profile of labour market issues suggests that the rounded outlook of the Charter on social rights can be difficult to implement in practice.

The theoretical discussion at the beginning of this chapter illustrated that equality can be pursued with different approaches. Neither the anti-discrimination approach, nor the social inclusion approach, offered a complete recipe for bringing about equality and it seems logical to explore how both can be combined. The Social Charter provides an example of a legal framework which has travelled some distance down this path. Its

⁴³ *DH and others v The Czech Republic* [GC] (2008) 47 EHRR 3; Application no. 32526/05 *Sampanis and Others v Greece*, 5 June 2008.

⁴⁴ E.g. *Nachova and others v Bulgaria* [GC] (2006) 42 EHRR 43; *Moldovan and others v Romania* (2007) 44 EHRR 16.

application in practice suggests that putting this kind of combined equality strategy into effect encounters its own difficulties and requires further elaboration.

BIBLIOGRAPHY

Collins, H. (2003) 'Discrimination, Equality and Social Inclusion' 66 *Modern Law Review* 16.

de Schutter, O. 'Positive Action' in Schiek, D. Waddington, L. and Bell, M. (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007).

European Commission (2006) *Gender Inequalities in the Risks of Poverty and Social Exclusion for Disadvantaged Groups in Thirty European Countries* (Office For Official Publications Of The European Communities (OOPEC))

European Commission (2004a) *The Situation of Roma in an Enlarged European Union* (OOPEC).

European Commission (2004b) *Joint Report on Social Inclusion 2004* (OOPEC).

European Commission (2002) *Joint Report on Social Inclusion* (OOPEC).

Ferrera, M., Matsaganis, M. and Sacchi, S. (2002) 'Open Coordination Against Poverty: The New EU Social Inclusion Process' 12 *Journal of European Social Policy* 227.

Fredman, S. (2008) *Human Rights Transformed – Positive Rights And Positive Duties* (Oxford University Press).

Fredman, S. (2002) *Discrimination Law* (Oxford University Press).

Peters, M., Seeds, K. and Harding, C. (2006) 'Findings from the Survey of Claimants in Race Discrimination Employment Tribunal Cases' *Employment Relations Research Series* No 54 (Department of Trade and Industry).

Schoukens, P. and Carmichael, L. (2001) 'Social Exclusion in Europe: Testing the Limits of European Integration' in Mayes, D., Berghman, J. and Salais, R. (eds), *Social Exclusion and European Policy* (Edward Elgar).