EMERGING JURISPRUDENCE ON INCLUSIVE EDUCATION UNDER THE EUROPEAN SOCIAL CHARTER (REVISED)

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1. Introduction

The European Social Charter 1961 (the Charter) and the European Social Charter (Revised) 1996 (ESC(R)) have arguably operated under the radar for decades. It is time for disability rights campaigners and academics to address the hidden existence of the ESC(R) and to bring it into the light. It is evident from the jurisprudence discussed in this chapter there is ample reason to look to the ESC(R) to assist in promoting inclusive education. This chapter addresses the emerging jurisprudence on inclusive education under the ESC(R). To that end this Chapter will introduce the European Social Charters: the 1961 Charter and the Revised Charter of 1996, which have led a somewhat hidden existence. This relative invisibility may be the result of the uneven application of the Charters, the fact that both Charters continue in existence, and the overarching complexity of the system in which they operate. The chapter addresses the right to education for children with disabilities and there are two relevant articles: Article 15[1] and Article 17.[2] Because of the dual coverage of the right to education it is necessary to address how the two articles interact. This chapter also addresses the strong presumption in favour of mainstream education, and when segregated or special provision is acceptable under the ESC(R).

In addition to reviewing the articles addressing the right to education, it is important to address the right to non-discrimination. Article E was introduced as an explicit article with the introduction of the ESC(R) and it had no predecessor in the 1961 Charter. Article E, like Article 14 European Convention on Human Rights (ECHR) does not constitute an autonomous right and the wording of both provisions are remarkably similar. The similarities aside, the differences between the provisions are most obviously reflected in their interpretation.[3] Article E has been interpreted broadly and clearly incorporates both direct and indirect discrimination. Finally, the chapter will then address both the collective complaints procedure, followed by the enforcement of case law of the European Committee of Social Rights (the Committee) of the ESC(R).

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[1] Article 15 of the European Social Charter (Revised) ("ESC(R)")(opened for signature 3 May 1996, entered into force 1 July 1999) CETS No 163 is titled: 'The right of persons with disabilities to independence, social integration and participation in the life of the community.'

[2] ibid, Article 17 is titled: 'The right of children and young persons to social, legal and economic protection.' This article encompasses the right to education.

[3] The European Court of Human Rights (ECtHR) interprets the provisions of the ECHR whereas the European Committee of Social Rights (the Committee) interprets the provisions of both the Charter and the ESC(R).

2. The Charters

The Charter was intended to be the sister of the ECHR: however, it is evident from both the literature and the paucity of cases that the Charter was completely overshadowed by its more famous sibling.[4] Where the ECHR has been 'the jewel in the Council of Europe crown,' the Charter, in contrast, has been an instrument with a 'twilight existence'.[5] De Schutter enumerated a number of failings of the Charter, including the failings of the supervisory system, the inability to invoke the Charter before national bodies, limitations within the text itself, and the *à la carte* nature of the obligations.[6] An additional criticism levelled against the Charter is that it had not sufficiently stood the test of time and that many of the rights contained in it 'are outdated and lag behind the national laws of states parties'.[7] For example, the Charter contained no right to education, and it referred to the necessity to take measures to place 'disabled persons in employment, such as specialised placing services, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment'.[8] In practice the Charter was 'largely ignored'.[9] Various attempts were made to address some of the deficits of the Charter that culminated in the adoption of the ESC(R).

The ESC(R) has maintained some of the more unusual features that were evident in the Charter, most notably the *à la carte* approach to ratification of the terms of the Convention. Part III of the ESC(R) requires State Parties to be bound by six of the nine core Articles (Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20)[10] and by 'not less than sixteen

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[4] Olivier De Schutter and Matthias Sant'ana, 'The European Committee of Social Rights' in Gauthier de Beco (ed), *Human Rights Monitoring Mechanisms of the Council of Europe* (Routledge 2012); Olivier De Schutter (ed), *The European Social Charter: A Social Constitution for Europe* (Bruylant 2010); Anne Theodore Briggs, 'Waking "Sleeping Beauty": The Revised European Social Charter' (2000) 7 Human Rights Brief 24; Andrzej M Świątkowski, *Charter of Social Rights of the Council of Europe* (Kluwer Law International 2008); François Vandamme, 'The Revision of the European Social Charter' (1994) 133 International Labour Review 635.

[5] David John Harris, 'A Fresh Impetus for the European Social Charter' (1992) 41 International & Comparative Law Quarterly 659, 659.

[6] Olivier De Schutter, 'The Two Lives of the European Social Charter' in Olivier De Schutter (ed), *The European Social Charter: A Social Constitution for Europe* (Bruylant 2010) 11–12.

[7] Robin Churchill and Urfan Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15 European Journal of International Law 417, 453.

[8] Article 15(2) European Social Charter (opened for signature 18 October 1961, entered into force 26 February 1965) CETS No 035.

[9] Olivier De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' (PE 536.488, Directorate-General for Internal Policies 2016) 9.

[10] ESC(R) (n 1) The relevant rights set out in these articles are: the right to work; the right to organise; the right to bargain collectively; the right of children and young persons to protection; the right to social security; the right to social and medical assistance; the right of the family to social, legal and economic protection; the right of migrant workers and their families to protection and assistance; the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

articles or sixty-three numbered paragraphs.'[11] The position with regard to the application of both the Charter and the ESC(R) is somewhat complicated. Where a State Party agrees to ratify the ESC(R) then the rights contained in the ESC(R) supersede those contained in the Charter of 1961. However, where a State Party does not accede to a particular right in the ESC(R) and there is an equivalent within the Charter of 1961 that they had ratified, they remain bound by the Charter of 1961. In other words they cannot use the ratification of the ESC(R) to opt out of particular commitments. Cullen notes that 'the complexity of the structure of obligations undertaken by states'[12] makes it difficult to navigate a State Party's obligations under either the Charter and the ESC(R) or potentially elements of both.[13] This patchwork protection means that the obligations imposed on each State Party may be slightly different depending on which Charter or which articles they have ratified. Thus it becomes important to understand the national position in order to appreciate what form of litigation, if any, can be taken in a particular State.[14]

3. Right to Education

It is against the backdrop of an ineffective Charter and the necessity to revitalise and update that process that the ESC(R) was introduced.[15] In the context of the right to education, it seems that the old adage *you wait for ages for a bus and then two come along at once* is appropriate. The Charter did not contain a right to education. In contrast, the ESC(R) addresses the educational rights of children with disabilities in two distinct articles. This part of the chapter addresses the impact of the dual coverage of the right to education; the commitment to inclusive education under both Article 15 and 17; finally this section addresses when and if segregated education is permitted under the ESC(R).

3.1 Dual Coverage

Article 17 ESC(R) addresses the right of children and young persons to social, legal, and economic protection, and provides for an express right to education. Article 15 establishes the right of persons with disabilities to independence, social integration and

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[11] ibid Part III, Article A undertakings.

[12] Holly Cullen, 'Is the European Social Charter a Charter for Children?' (2005) 40 Irish Jurist 60, 61.

[13] Only Spain ratified the 1961 Charter in its entirety, and only France and Portugal have ratified the 1996 ESC(R) in its entirety. Additionally the United Kingdom, Iceland and Denmark have only ratified the 1961 Charter. In contrast, countries such as Bosnia and Herzegovina, Serbia, and Montenegro have only ratified the 1996 ESC(R).

[14] The potential to litigate is also dependent on a State Party acceding to the collective Complaints mechanism.

[15] For a detailed discussion of this see De Schutter, 'The Two Lives of the European Social Charter' (n 6); De Schutter and Sant'ana (n 4); Świątkowski (n 4) chs 1 - 4; Vandamme (n 4).

participation in the life of the community, including ‘education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private’.[16] It is evident that there is an overlap in the material scope of these two articles.

The Committee has established that Article 17 applies to all children including children with disabilities, but it goes on to provide that in respect of States having accepted Article 17 and Article 15, the right to education for children with disabilities is to be primarily examined under Article 15(1).[17] While Article 15(1) covers the right to education of children with disabilities, this does not exclude the relevant issues being examined in the framework of Article 17(2).[18] In practice this means that a failure to ratify Article 15 will not relieve a State from responsibility for the education of children with disabilities where that State has ratified Article 17. In *Mental Disability Advocacy Centre (MDAC) v Bulgaria*[19] the State party had ratified Article 17 but had not ratified Article 15, resulting in the Committee examining the right to education for children with disabilities under Article 17. In that action it was held that Bulgaria violated the right to education Article 17(2) and the right to non-discrimination (discussed below) of ESC(R) for depriving children with intellectual disabilities of their right to education. Consequently the interpretations of both Article 17 and Article 15 have an importance when assessing the right to education for children with disabilities.

3.2 Inclusive Education

Article 15 explicitly provides that education should take place in ‘the framework of general schemes wherever possible’[20] and only if this is not possible should ‘specialised bodies’[21] be considered. Article 15 reflects a significant change in disability policy at the Council of Europe level in that there is a clear move ‘from welfare and segregation and towards inclusion and choice.’[22] It is evident from the case law and Recommendations of the Committee of Ministers[23] that there has been a profound shift in the values of the

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[16] Article 15(1) ESC(R) (n 1).

[17] European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights* (Council of Europe 2008) 121.

[18] *Mental Disability Advocacy Center (MDAC) v Bulgaria* Complaint No 41/2007 (ECSR, 3 June 2008) [33].

[19] *MDAC v Bulgaria* (n 18).

[20] Article 15(1) European Social Charter (Revised) (n 1).

[21] ‘Specialised bodies’ is the term used in the ESC(R), however from the case law to date these ‘specialised bodies’ generally provide education in segregated settings.

[22] European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights* (n 17) 111.

[23] Council of Europe Committee of Ministers, ‘Recommendation no R(92)6 of the Committee of Ministers to Member States on a Coherent Policy for People with Disabilities’ (9 April 1992); Council of Europe Committee of Ministers, ‘Recommendation CM/Rec(2009)8 of the Committee of Ministers to Member States on Achieving Full Participation through Universal Design’ (21 October 2009); Council of Europe Committee of Ministers, ‘Recommendation Rec(2006)5 of the Committee of Ministers to

Council of Europe as regards people with disabilities. This shift reflects the changes evidenced internationally by the introduction of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).[24] This paradigm shift is in essence the move from treating people with disabilities as objects of charity or pity, toward respecting people with disabilities as equal citizens: this is often described as the move from the medical model of disability to the social model of disability.

Article 15 expresses a clear presumption in favour of mainstreaming. Education should be provided 'in the framework of general schemes wherever possible'.[25] This presumption in favour of mainstream educational provision is more than a policy commitment to the inclusion of a child with a disability within the mainstream education system. In order for State Parties to comply with the requirements of Article 15(1) the Committee considers necessary the existence of

> [N]on-discrimination legislation as an important tool for the advancement of the inclusion of children with disabilities into general or mainstream educational schemes. Such legislation should, as a minimum, require a compelling justification for special or segregated educational systems and confer an effective remedy on those who are found to have been unlawfully excluded or segregated or otherwise denied an effective right to education. Legislation may consist of general anti-discrimination legislation, specific legislation concerning education, or a combination of the two.[26]

This clearly states that the presumption of mainstream education should have a legislative base. Interestingly that legislation could take the form of non-discrimination legislation or a non-discrimination clause within education legislation, thus linking special or segregated education to discrimination on the basis of disability.

Article 17 provides for an express right to education and requires State Parties to take all 'appropriate and necessary measures' to ensure compliance with the provisions of

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Member States on the Council of Europe Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006-2015' (5 April 2006); Council of Europe Committee of Ministers, 'Recommendation CM/Rec(2013)2 of the Committee of Ministers to Member States on Ensuring Full Inclusion of Children and Young Persons with Disabilities into Society' (16 October 2013).

[24] See in particular the endorsement of the social model of disability as is evidenced in Article 1 and Paragraph 5 of the Preamble to the United Nations Convention on the Rights of Persons with Disabilities (United Nations) (adopted 13 December 2006, opened for signature 30 March 2007, entered into force 3 May 2008) and see generally: Shivaun Quinlivan, 'The United Nations Convention on the Rights of Persons with Disabilities: An Introduction' (2012) 13 ERA Forum 71.

[25] ESC(R) (n 1) Article 15(1).

[26] European Committee of Social Rights, *Conclusions 2007 - Volume 1 (Albania, Armenia, Belgium, Bulgaria, Cyprus, Estonia, Finland, France)* (Council of Europe Publishing 2007) 12; see also European Committee of Social Rights, *Conclusions 2007 - Volume 2 (Ireland, Italy, Lithuania, Moldova, Norway, Romania, Slovenia, Sweden)* (Council of Europe Publishing 2007).

the Article. Article 17 addresses the general education system and does not refer expressly to mainstream or special education. The Committee have held that Article 17 does however require equal access to education for all and states:

> Equal access to education must be ensured for all children, in this respect particular attention should be paid to vulnerable groups such as children from minorities, […] Children belonging to these groups must be integrated into mainstream educational facilities and ordinary educational schemes. Where necessary special measures should be taken to ensure equal access to education for these children. However, special measures for Roma children should not involve the establishment of separate schools or classes reserved for this group.[27]

While reference is made to vulnerable groups, no specific reference is made to children with disabilities within the list of groups mentioned. Despite this omission, the list clearly is illustrative and not exhaustive. In addition, the provision makes it clear that the default position should be inclusion, not segregation. Reference is made to 'special measures', but those special actions should be taken to ensure equal access to education. Moreover, Article 17 expressly states when referencing Roma children that any special measures should not involve the establishment of separate schools or classes. Arguably the same principles could be assumed with regard to children with disabilities, and where special measures are provided it is contended that they should be provided within the general education system. While this point is not expressly stated in Article 17, its application to the education of children with disabilities is evident from case law.

In *MDAC v Bulgaria*, national legislation introduced in 2002 provided for education for all with a presumption in favour of mainstream education,[28] stating:

> Children shall attend special schools only where all other possibilities of attending mainstream kindergartens and schools have been exhausted, subject to the explicit consent of parents or tutors.[29]

MDAC alleged that the Bulgarian government had failed to implement the legislation effectively. The complaint related to 28 specific institutions where many of the resident children had been either abandoned or orphaned.[30] The complaint alleged that the right to education was being denied to the children as official statistics established that only 6.2% of the children (subject of this action) were enrolled in schools; mainstream

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[27] European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights* (n 17) 120.

[28] The situation prior to 2002 denied education to children with severe and profound intellectual disabilities who were classified by law as uneducable.

[29] Order No 6 (2002) on the Education of Children with Special Educational Needs and/or Chronic Diseases Article 2.

[30] *MDAC v Bulgaria* (n 18) [20].

schools were not adapted to accommodate the abilities and needs of the children; the education if provided was wholly inadequate; and a lack of resources could not in this case serve as a valid defence on the facts.[31]

In response, the Bulgarian Government highlighted the passage of the relevant legislation and the practical steps taken to overcome problems of access for this group of children. The Government emphasised several action plans as well as a clear political commitment of the Bulgarian Government towards integrating children into mainstream schools. The Government noted that this was an

> ongoing process, the visible results of which will become evident in the long term and which will require considerable financial input. The Government hopes to achieve the Revised Charter's objectives "within a reasonable period of time", with measurable progress and with the fullest possible use of available resources.[32]

The Committee stated that Article 17 required States Parties 'to establish and maintain an education system that is both accessible and effective.'[33] The Committee reiterated earlier decisions to the effect that the aim of the ESC(R) is to 'protect rights not merely theoretically, but also in fact'.[34] Accordingly it is not sufficient to enact legislation: implementation is crucial. In assessing whether the system is effective there must be a high quality of teaching and equal access to education for all children, in particular vulnerable groups.[35] In finding against Bulgaria the Committee held that 'teaching in specialised schools must be the exception'.[36] Thus Article 17(2) on its own without reference to Article 15 creates a presumption in favour of mainstreaming.

In *Autism Europe v France* the Committee affirmed that the basic premise 'of Article 15 is one of equal citizenship for persons with disabilities'.[37] Further, the right to education and securing that right for children 'with disabilities plays an obviously important role in advancing these citizenship rights'.[38] Moreover, Article 17 provides for the full development of the child and this is of course as applicable to children with disabilities. The Committee then noted that this approach was arguably more important to children with disabilities 'where the effects of ineffective or untimely intervention

[31] ibid [18–26].
[32] ibid [32], and see more generally paragraphs 27-32.
[33] ibid [34].
[34] ibid [38] citing previous jurisprudence of the committee *International Commission of Jurists (ICJ) v Portugal* Complaint No 1/1998 Decision on the Merits (ECSR, 10 September 1999).
[35] *MDAC v Bulgaria* (n 18) [34]; European Committee of Social Rights, 'Conclusions 2005) (Bulgaria)' (2005).
[36] *MDAC v Bulgaria* (n 18) [35].
[37] *International Association Autism Europe v France* Complaint No 13/2002 Decision on the Merits (ESCR, 4 November 2003) [48].
[38] ibid.

are ever likely to be undone'.[39] The impact of the decision in *Autism Europe v France* is that Article 17 as it applies to children with disabilities is guided by the principles contained in Article 15. According to Quinn, this case highlighted a 'natural link' between these two Articles, as 'Article 17 was very explicit on the institutions and services required whereas Article 15 was more explicit on the philosophy that should inform these institutions.'[40] This position is reiterated in *AEH v France* when the Committee reaffirmed that Article 15 reflects a shift in values that has occurred in Europe with regard to persons with disabilities. 'Securing a right to education for children and others with disabilities plays a patently important role in advancing these citizenship rights',[41] and such rights should where possible take place in the mainstream system.[42] Consequently, it appears that the right to education in Article 17 as it applies to children with disabilities is to be guided by the principles in Article 15.

All of the decided cases to date reflect a common theme of the exclusion of children with disabilities from the education system, in effect these cases were about access to education for the children concerned. In contrast, the case of *MDAC v Belgium*[43] currently progressing through the collective complaints procedure is a case of significant interest and importance. This complaint does not focus primarily on access to education for children with disabilities, but instead alleges that the education being received by the children is not in compliance with the ESC(R). The applicants in this action produced statistical evidence that indicates that the percentage of pupils in segregated special education in the Flemish community is the highest in Europe.[44] Consequently, the statistics show that some 6% of pupils require some sort of reasonable educational accommodation and that 85% of those pupils attend segregated education. Of interest here is the fact that the children in question are in receipt of an education albeit in a segregated system and the applicants allege that this is a violation of Articles 15, 17 and Article E in conjunction with Articles 15 and 17 ESC(R). Notwithstanding, the Committee has to date provided an expansive and generous interpretation of the right to education and the right to non-discrimination in the field of education for children with disabilities. Those cases have been about access to the education system for the children

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[39] ibid [49].

[40] Gerard Quinn, 'The European Social Charter and EU Anti-Discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose' in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (OUP 2005) 297.

[41] *European Action of the Disabled (AEH) v France* Complaint No 81/2012 Decision on the Merits (ESCR, 11 September 2013) [75].

[42] The Committee in assessing France's on-going compliance with Article 15(1) found France to be in non-compliance, see: European Committee of Social Rights, 'Conclusions 2008 (France)' (November 2008); European Committee of Social Rights, 'Conclusions 2012 (France)' (January 2013).

[43] *MDAC v Belgium* Complaint No 109/2014 (ESCR, complaint registered 30 April 2014).

[44] European Agency for Development in Special Needs Education, *Special Needs Education: Country Data 2010* (European Agency for Development in Special Needs Education 2011) 8-9; Serge Ebersold, 'Inclusive Education for Young Disabled People in Europe: Trends, Issues and Challenges: A Synthesis of Evidence from ANED Country Reports and Additional Sources' (*ANED*, 24 July 2012) <www.disability-europe.net/downloads/72-aned-2010-task-5-education-final-report-final-2-0> accessed 27 June 2017.

concerned. The real potential of the ESC(R) will be put to the test when it addresses the challenges of the very substance of the education provided, or as with *MDAC v Belgium* the venue of the education provided for children with disabilities.

3.3 Provision of special or segregated education

Evidently, both Article 15 and Article 17 introduce a strong presumption in favour of mainstream education. Further, Article 15 appears to accept that there may be limited occasions where it is not possible to mainstream a child with disabilities and then, in such cases, education should be provided 'through specialised bodies, public or private'.[45] Separate education, where necessary, is narrowly bounded so that any segregated provision must be based on a 'compelling justification', requiring an 'effective remedy' for those '"unlawfully excluded or segregated'.[46]

It is undoubted that the decision in *AEH v France* reaffirmed the strong presumption in favour of mainstream educational provision and from that decision we can extrapolate whether and how segregated educational provision will be acceptable under the ESC(R). The complainant in this action alleged that many children with autism were being deprived of the right to education under the ESC(R). While there were some discrepancies between the parties as to exact figures, it was evident that significant proportions of children with autism were without educational provision.[47] Moreover AEH noted that contrary to the requirements of domestic legislation, only a minority of children with autism had access to mainstream schooling. As children moved through the system, the attendance of children with autism in the mainstream decreased significantly.[48]It was further alleged that school integration classes amounted to ghettos within the mainstream.[49] Perhaps of greatest concern was the fact that the

> French state has helped to finance the schooling of children and adolescents with autism in specialised classes run by trained professionals in Belgium.[50]

Thus, France, in effect, exported the '*problem'* of educating children with disabilities. Finally concerns were raised in relation to the adequacy of the special education

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[45] ESC(R) (n 1) Article 15(1).

[46] European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights* (n 17) 112.

[47] The French Government's figures suggested that in 2006, 64% of children with autism received no form of schooling. In contrast to this figure, the associations active in this field estimate that only 20% of children with autism have access to some form of schooling, suggesting that 40,000 autistic children of school going age have no access to schooling whether in ordinary classes or in other situations. For further, see *AEH v France* (n 41) [32]–[35].

[48] ibid [36]–[39].

[49] ibid [41]–[42].

[50] ibid [46].

provision, which took place in either medico-educational institutions or day hospital units. These provisions were criticised for failing to ensure that education took place in the mainstream wherever possible.

In response to the arguments raised, the French Government pointed out that French positive law was in compliance with the ESC(R). It was further argued that France had introduced autism action plans with earmarked funds, and such efforts established 'political goodwill with a view to tackling the problem of autism.'[51] Interestingly, the French Government posited that Article 15 does not require education for persons with disabilities to take place exclusively in mainstream schools.[52] The Government also challenged the proposition 'that care in a medico-social or health establishment combined with appropriate schooling' does not meet the social integration objective set by Article 15 of the Charter.[53] The Government specifically referred to '[s]teering children towards facilities other than mainstream schools [...]'[54] and noted that 'France has established a system allowing for persons with autism's medical, psychological and social treatment while also providing for their schooling.'[55] This is the provision of Applied Behaviour Analysis (ABA), which is regarded as exemplar among educational interventions for students with autism. ABA is deemed to be 'primarily developmental and educational in nature and is aimed at gradually integrating those concerned into a mainstream school environment.'[56] The decision in *AEH v France* is somewhat confused on this point, while not critical of the actual educational interventions provided it appears the venue of those interventions was the point of concern.

The Committee in *AEH v France* held that in order for education to happen in a forum other than the mainstream, a variety of factors need to be considered, including 'the type of disability concerned, how serious it is and a variety of individual circumstances to be examined on a case-by-case basis.'[57] It was further noted that, in general, states have a wide margin of appreciation in the way in which they implement the ESC(R).[58] That noted Article 15(1) does not

> leave States Parties a wide margin of appreciation when it comes to choosing the type of school in which they will promote the independence, integration and participation of persons with disabilities, as this must clearly be a mainstream school.[59]

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[51] ibid [49] this is a direct quote from the respondents reported in the decision.
[52] ibid [59].
[53] ibid [60].
[54] ibid [61].
[55] ibid [62].
[56] ibid [117].
[57] ibid [78].
[58] ibid [81] based on *European Council of Police Trade Unions (CESP) v Portugal* Complaint No 37/2006 Decision on the Merits (ESCR, 3 December 2007) [14].
[59] *AEH v France* (n 41) [78].

Thus it may be assumed that any automatically exclusionary practices will fall foul of the obligations contained in the ESC(R). What we can take from the decision in *AEH v France* is that segregated education is not in itself inherently in conflict with the requirements of the ESC(R). However, children should not be automatically sent to a segregated provision and any decisions on segregated education should be based on an individual assessment of that child. Any education provided within the mainstream should be suited to the needs of children concerned and the failure to meet the needs of children with disabilities within the mainstream also denies them the right to education.[60] Moreover, State Parties should introduce a legislative presumption in favour of mainstream education, and that presumption should ideally be situated within anti-discrimination legislation.

4. Article E ESC(R) – Non-Discrimination

The revision of the Charter saw the introduction of a new express article on non-discrimination (Article E). This clearly indicated the desire for a stronger articulation of the principle of non-discrimination. Furthermore, the Committee has expressed the view that the insertion of a separate article in the ESC(R) represents 'the heightened importance the drafters paid to the principle of non-discrimination'.[61] Article E does not constitute an autonomous right which could provide an independent ground for a complaint. It is always necessary to invoke Article E in conjunction with another provision of the Charter. It is submitted that a stand-alone provision would be preferable, however the fact of this limitation is not fatal to the discussion at hand, namely the right to education for children with disabilities. This part of the chapter addresses the interpretation of the phrase 'other status'; the interpretation by the Committee of the non-discrimination duty; and finally this section addresses the dissenting judgement in *AEH v France.*

4.1 'Other Status'

Article E provides:

> The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or

[60] ibid [44].

[61] *Autism Europe v France* (n 37) [51].

> social origin, health, association with a national minority, birth or other status.

It is evident from the wording that Article E draws quite heavily from its more famous sibling, Article 14 ECHR. Moreover, the article contains no explicit reference to disability as a protected ground, but the list of protected grounds is a non-exhaustive list. The Committee in *Autism Europe v France* held that the phrase 'or other status' ensures that people with disabilities are covered by the terms of Article E.[62] Additionally, in this case it was stated 'that Article 15 applies to all persons with disabilities regardless of the nature and origin of their disability and irrespective of their age.'[63] It would be incongruous to have an article of the ESC(R) devoted to the rights of persons with disabilities and not have them covered by Article E.

4.2 Discrimination

The Committee has from the outset interpreted Article E in a broad and robust manner. *ICJ v Portugal*, the first complaint heard by the Committee, stated that 'the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact'.[64] As a result of this, the Committee will look beyond the mere introduction of legislation and focus quite clearly on the implementation of that legislation as is evident from later decisions such as *AEH v France.*[65]

The Committee has expressly accepted 'that Article E not only prohibits direct discrimination but also all forms of indirect discrimination.'[66] The Committee's analysis of Article E provides an intriguing contrast to the interpretation by the ECtHR of Article 14 of the ECHR. The Committee relied on decisions of the ECtHR, but to a potentially more dramatic effect. *Thlimmenos v Greece*[67] was the first case to suggest that the ECHR may cover indirect discrimination[68] and the Committee cited the ECtHR who stated:

> The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States

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[62] *Autism Europe v France* (n 37) [18] see also; *AEH v France* (n 41); *MDAC v Bulgaria* (n 18).
[63] *Autism Europe v France* (n 37) [48].
[64] *International Commission of Jurists (ICJ) v Portugal* (n 34) [32].
[65] *AEH v France* (n 41).
[66] *Autism Europe v France* (n 37) [52].
[67] *Thlimmenos v Greece* App no 34369/97 (ECtHR, 6 April 2000).
[68] De Schutter in contrast contends that this case represents the first reasonable accommodation case, see Olivier De Schutter, 'Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing 2005).

> without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[69]

The Committee in *Autism Europe v France* took this statement and stated:

> In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.[70]

The Committee's interpretation of indirect discrimination is expansive. The Committee requires a State party to respond positively and with discernment to human difference, thus requiring state parties to 'take due and positive account' or to 'take adequate steps' to ensure that the rights within the ESC(R) are really accessible to all. The Committee in this action suggests that States need to have a positive targeted response to human difference that is arguably a stronger requirement than to just prohibit indirect discrimination. In the instant case, it was not sufficient that the State had legislatively provided for the right to education for children with disabilities - equally it was not sufficient that they had increased their budget spend and their actions in this regard. The Committee held that the French Government had not taken 'adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.'[71] Lord and Brown contend that this case is about the French school system failing to accommodate the individual needs of students.[72] In effect a collective right to reasonable accommodation.[73] Quinn on the other hand suggests that it is the very difference in the Treaties that gives rise to this different response, stating:

> Unlike the ECHR, [the ESC(R)] is specifically designed to provide for positive rights. So the equality/non-discrimination ideal takes on a different function. It need not be used to generate positive rights—they are already posited under the instrument. Rather, it calls for sensitivity in the delivery of those rights toward difference.[74]

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[69] *Autism Europe v France* (n 37) [52] citing *Thlimmenos v Greece* (n 67) [44].
[70] *Autism Europe v France* (n 37) [52].
[71] ibid.
[72] Janet E Lord and Rebecca Brown, 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities' in Marcia H Rioux, Lee Ann Basser and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff 2011).
[73] The duty to provide reasonable accommodation enshrined in the CRPD is an individualised duty, see Shivaun Quinlivan, 'The 4 R's: Has Reasonable Accommodation Become an Integral Part of the Right to Education for Persons with Disabilities?' in *The Right to Inclusive Education in International Human Rights Law* (Cambridge University Press, forthcoming). However, due to the collective nature of complaints taken under the ESC(R), such an individualised approach is not possible. As the Committee continues to develop its equality jurisprudence, we may see a further development of this notion of a collective right to reasonable accommodation.
[74] Quinn (n 40) 298.

Thus there is a requirement to respond appropriately to human difference and to ensure 'real and effective equality.'[75] Additionally on the issue of indirect discrimination, the Committee has a highly nuanced understanding of the impact of arguably neutral decisions. For example, in response to the decision of *Autism Europe v France*, the French Government introduced a number of action plans and policies in respect of the education of children and adults with autism. These actions had been operationalised in the context of significant budget restrictions. The French Government highlighted the cuts that were made in the field of education generally, thus arguably affecting all people regardless of whether they are with or without a disability. In *AEH v France* the Government contended that the cutting of social protection funding affects everyone covered by that funding and is not in itself discriminatory. The Committee stated:

> However, in the specific field of disability, the Committee considers that indirect discrimination can be taken to occur where an apparently neutral provision, criterion or practice would put persons having a disability at a particular disadvantage compared with other persons, unless it can be justified […]
> Accordingly, the Committee considers that a person with a disability is more likely to be dependent on community care, funded through the State budget, in order to live independently and in dignity, as compared with other persons in receipt of community care. The Committee takes the view that budget restrictions in social policy matters are likely to place persons with disabilities at a disadvantage and thus result in a difference in treatment indirectly based on disability.[76]

The Committee accepted that cuts might be required in a state's budgetary allocation. However a State Party must have regard to the impact of such budgetary cuts. This suggests that it may be necessary for a State Party to equality proof budgetary decisions. This decision underscores the expansive interpretation of the indirect discrimination concept. Moreover, this decision gave rise to a dissent, which is worth assessing as some of the issues raised highlight the novelty and the potential of the collective complaints process.[77]

4.3 The Dissent in AEH v France

France, in *AEH v France,* was found to have violated Article E. Addressing the violation of Article E, the Committee reiterated the fact that disability was covered by

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[75] European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights* (n 17) 176.

[76] *AEH v France* (n 41) [143] and [144].

[77] ibid appendix contain the dissenting opinion of Lauri Leppik joined by Monika Schlachter.

the term 'or other status', that Article E covered both direct and indirect discrimination, and that positive duties were imposed on State parties to make sure all rights were genuinely accessible to all.[78] The core of this decision revolved around the cross border flow of children and adults with autism from France to Belgium. This fact according to the majority was illustrative of

> [The French] Government's failure to cater for the specific schooling needs of all these persons within its national territory, thereby imposing on them a way of life different from the treatment reserved for persons not suffering from a mental or physical disability and in the same situation as regards their schooling needs.[79]

The fact of the cross border flow of children from France to Belgium was held to be directly discriminatory. There was no evidence ascertained during this case to suggest that children without disabilities were traveling to Belgium to receive an education. However, equally there was no evidence to suggest that they were not. It was France's failure to refute this particular element that allowed the majority of the Committee to find a violation of Article E of the ESC(R) taken in conjunction with Article 15(1). The two dissentients, Leppik and Schlachter, questioned the failure to provide substantive reasoning by the Committee in their finding that the flow of people with autism to Belgium was in fact direct discrimination. The dissent stated:

> that an unjustified failure to provide reasonable accommodation for education of children and adolescents with autism would constitute discrimination on grounds of disability, in the instant case the finding of direct discrimination by the majority of the Committee is based on a remarkably relaxed interpretation of less favourable treatment.[80]

Thus the two dissentients appear to accept that were there an 'unjustified' failure to accommodate that would amount to discrimination. The use of the term unjustified is curious, suggesting that there may be a justified reason not to provide a reasonable accommodation. But the issue in this case was whether the evidential barrier to prove direct discrimination had actually been met. Leppik and Schlachter assessed the necessity for an appropriate comparator and contended that the Committee should be

> able to demonstrate that persons with autism have been exposed to some detriment or disadvantage because of their disability to which persons unaffected by such disability would either not have been

[78] ibid [133].
[79] ibid [135].
[80] ibid appendix.

> exposed or, in the case of indirect discrimination, have been significantly less exposed.[81]

Leppik and Schlachter contended that the fact of a cross border flow of children and adults with autism was not in itself sufficient to find that in fact these people have suffered a detriment. While accepting that the Committee did not follow the strict evidential barriers imposed in individual non-discrimination legislation, this is not, in this author's opinion, a failing of the procedure because, as Bell suggests,

> [b]y highlighting the values underpinning the Charter, such as human dignity or social inclusion, […] [the Committee] has avoided a narrow and restrictive concept of non-discrimination. It takes a purposive approach with considerable stress on ensuring the practical realisation of rights.[82]

It is undoubtedly true that the principle of non-discrimination adopted by the Committee under the ESC(R) lacks the specific procedural and definitional elements that are found in other legal regimes,[83] clearly the concern of both Leppik and Schlachter. That noted, it is contended that the system of the ESC(R) does not lend itself as readily to the more formulaic system of non-discrimination adopted in individual complaints. It is the very nature of a collective complaints system that the focus is on patterns of behaviour that may disadvantage groups within society that arise from law or practice. Thus the practice of sending people with autism to Belgium to receive their education where there was no corresponding evidence of this happening with any other group was enough to meet the evidential barrier in this instance. Leppik and Schlachter raise an important issue and that is the lack of clear principles to apply to allegations of discrimination in the context of a collective complaint. It is suggested that, unlike other non-discrimination regimes, the ESC(R) is still relatively new and will in time develop tenets and doctrines appropriate to a collective regime, which it is proposed should be different to the doctrines as they apply to individual litigation.

5. Enforcement

It seems appropriate at this junction to give an overview of the collective complaints system and perhaps to raise a cautionary note. There are many positives to the

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[81] ibid.

[82] Mark Bell, 'Combating Discrimination through Collective Complaints under the European Social Charter' in Olivier De Schutter (ed), *The European Social Charter: A Social Constitution for Europe* (Bruylant 2010) 47.

[83] See for example the requirements of establishing an action for non-discrimination under the European Union. For a more detailed discussion of this point see Mark Bell, 'Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination' in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (OUP 2005).

introduction and interpretation of the ESC(R), however, the system has its weaknesses also, most notably the enforcement procedures. The ESC(R) is primarily enforced through the Committee.[84] The Committee has two main functions, first assessing national reports, and second considering collective complaints. The focus of this section is on the enforcement of the collective complaints mechanism.[85] This section will set out in brief the collective complaints mechanism and then address the enforcement procedures under the ESC(R).

5.1 The collective complaints mechanism

The collective complaints mechanism was introduced in the Additional Protocol to the European Social Charter 1995.[86] This was part 'of the efforts initiated in 1991 to give a new impetus to the Charter.'[87] The procedure is unusual in a number of respects. The procedure allows for three types of organisation to submit complaints,[88] these are: international organisations of employers and trade unions;[89] international non-governmental organisations (INGOs) with consultative status at the Council of Europe;[90] and representative national organisations of employers and trade unions.[91] The Committee must, as part of the complaint procedure, ensure that any complaint by an INGO falls within the field of competence of the relevant body, or where a body is

[84] Both the Governmental Committee and the Committee of Ministers play a role in the monitoring of the ESC(R).

[85] For a detailed analysis of this system see De Schutter and Sant'ana (n 4). Briefly, State Parties report annually but not on every right within the ESC(R), the rights have been categorised into four themes: Group 1 address employment, training and equal opportunities; Group 2 address health, social security and social protection rights; Group 3 address labour rights; Group 4 address children, families and migrants. What this means in practice is that State parties report on each right at least once in every four years. Further it is worth commenting on Article 22 that requires State Parties to report periodically on those provisions it has not accepted. It is hoped that the necessity to report on such measures will in time lead State parties to agree to ratify the relevant provisions.

[86] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (opened for signature 9 November 1995, entered into force 1 July 1998) CETS No 158; For more information on this system see Philip Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (OUP 2005); Mark Bell, 'Combating Discrimination through Collective Complaints under the European Social Charter' in The European Network of Legal Experts in the Non-Discrimination Field, *European Anti-Discrimination Law Review*, vol 3 (European Commission 2006); Régis Brillat, 'A New Protocol to the European Social Charter Providing for Collective Complaints' [1996] European Human Rights Law Review 52; Holly Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 Human Rights Law Review 61; Churchill and Khaliq (n 7).

[87] Brillat (n 86) 58.

[88] For a full list of the organisations entitled to take action see: <www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure1> accessed 13 July 2017.

[89] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (n 86) Article 1(a).

[90] ibid Article 1(b).

[91] ibid Article 1(c).

a representative body that they do in fact represent the relevant constituency.[92] The Committee has not adopted an overly onerous test in this regard. Churchill and Khaliq describe the test adopted as 'one of "some competence" with regard to the issue raised by the complaint rather than "particular competence" in the matters governed by the Charter'.[93] Additionally any State Party to the Protocol may also permit national non-governmental organisations (NGOs) within its jurisdiction to lodge complaints against it. In fact, of the 13 parties to the Protocol, only Finland permits NGO's to take complaints against the State. The failure to allow national NGOs to take a complaint may be one of the reasons why the Treaty remains under-exploited. It has been contended by De Schutter that the failure to allow NGOs to take cases has not proven to be a significant barrier as many of the INGOs will allow an action taken in its name.[94] From a disability perspective there are several important INGOs with consultative status including: European Action of the Disabled (AEH), Mental Disability Advocacy Centre (MDAC),[95] European Disability Forum (EDF), International Association of Autism Europe (IAAE) and Inclusion International – Inclusion Europe.

This procedure is a collective procedure, therefore these complaints must relate to alleged non-compliance of a state's law or practice with the provisions of the ESC(R). Individual actions are not permitted.[96] Unlike most non-discrimination systems, this system assesses a State Party's laws, systems and practices. But it may also be possible for an individual who alleges a violation of the Charter or the ESC(R) to contact an NGO or an INGO and request that they take an action on his/her behalf. Such an action would, of necessity, need to be sufficiently general to show 'a general pattern of non-compliance'.[97] Regardless of whether an individual can or cannot litigate, this in itself is not a weakness in the system. Bell highlights that

> [t]he collective dimension to group inequality can be lost within individual litigation. Moreover, individuals from those groups that

[92] *Syndicat occitan de l'education v France* Complaint No 23/2003 Decision on Admissibility (ECSR, 13 February 2004) [4]. The Committee noted 'that for the purpose of the collective complaints procedure, representativity is an autonomous concept, not necessarily identical to the national notion of representativity.'

[93] Churchill and Khaliq (n 7) 428.

[94] De Schutter, 'The Two Lives of the European Social Charter' (n 6) 23; One example of this given by De Schutter is *International Federation of Human Rights (FIDH) v Ireland* Complaint No 42/2007 Decision on the Merits (ESCR, 3 June 2008). In this case FIDH endorsed the concerns raised by the Free Legal Advice Centre (a national NGO).

[95] Most recently MDAC has lodged a collective complaint against Belgium, *MDAC v Belgium* (n 43) lodged in May of 2014, this complaint addresses inclusive education for children with intellectual and psycho-social disabilities and alleges a violation of Article E in relation to Article 15 and 17 of the ESC(R).

[96] Churchill and Khaliq contend that there may be a 'grey area [...] where complaints may be made that the practical application of legislation or an administrative practice, as shown in its application to particular individuals, is contrary to the Charter. It would seem that as long as there are a reasonably significant number of groups of individuals involved demonstrating a generality of practice, complaints of this nature will be admissible.' Churchill and Khaliq (n 7) 431.

[97] ibid 432.

> are most marginalised in society are least likely to be equipped to initiate litigation. In contrast, the collective complaints mechanism does not depend on the identification of an individual victim, but places emphasis on patterns of behaviour and the discriminatory effects arising from law and institutional practice.[98]

The collective complaints procedure is perhaps best described as an attempt to address more systemic breaches of the rights contained in the ESC(R) and the Charter. It is this collective nature of the complaint procedure that has also led to the interpretation that there is no necessity to exhaust domestic remedies,[99] which also means that in contrast to other systems this process is relatively speedy. However, the limitations to this system relate to its enforcement.

5.2 Enforcement of the Collective Complaint

The Committee's role is a quasi-judicial role and will apply the law to the facts presented in order to reach its conclusion. On reaching that conclusion, the Committee then adopts a report which will contain its conclusions in respect of the relevant State Party and whether it is in compliance with the ESC(R) or not. This report is not final as it is necessary to transmit that report to the Committee of Ministers of the Council of Europe, and it is then this body which makes the final decision as to whether the complaint is upheld. Article 9 of the Additional Protocol of 1995 provides that if there has been a finding that either of the Charters has not been satisfactorily applied then 'the Committee of Ministers shall adopt, […] a recommendation addressed to the Contracting Party concerned.'[100] In practice, the Committee of Ministers more often than not adopt a resolution addressed at the relevant State Party. These resolutions often set out what the state has already done, what steps have been taken and then specify what measures are still required. This procedure of producing resolutions has been criticised as a 'weak response',[101] and 'highly deferential to states.'[102] This deference is evident when consideration is given to the final outcomes of the decision *World Organisation against Torture (OMCT) v Ireland*.[103]

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[98] Bell, 'Combating Discrimination through Collective Complaints under the European Social Charter' (n 85) 17-18.

[99] See <www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure1> last accessed 13 July 2017.

[100] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (n 86) Article 9(1).

[101] David John Harris and John Darcy, *The European Social Charter* (Procedural Aspects of International Law Series vol 25, 2nd edn, Transnational Publishers 2001) 367; Bell, 'Combating Discrimination through Collective Complaints under the European Social Charter' (n 85); Churchill and Khaliq (n 7); Cullen (2009) (n 86); De Schutter, *The European Social Charter* (n 4).

[102] Cullen (2005) (n 12) 77.

[103] *World Organisation against Torture (OMCT) v Ireland* Complaint No 18/2003 Decision on the Merits (ESCR, 7 December 2004).

OMCT v Ireland is the first case taken against Ireland using the collective complaints system. The case was lodged in 2003 and decided in 2005. Ireland was found to be in violation of Article 17 ESC(R). Briefly in this case it was alleged that Irish law failed to protect children from corporal punishment. While there were statutory prohibitions on corporal punishment in place, Irish common law permitted the use of moderate or reasonable chastisement of a child.[104] This acted as a defence to a charge of assault against a child. This defence was available to parents and other persons *in loco parentis*.[105] While there were many prohibitions in law and regulations on the use of corporal punishment, the OMCT sought to challenge the 'gaps in legal coverage'.[106] The Irish Government defended the action and amongst their arguments they maintained 'that the law adequately protects children from serious assault in that serious forms of assault/punishment will not attract the defence of reasonable chastisement'.[107] Therefore, where the punishment goes beyond what would be deemed to be the reasonable chastisement of a child, a parent or a person *in loco parentis* could in fact be prosecuted. The Committee found that Ireland was in violation of Article 17 of the ESC(R), and in reaching this finding it stated:

> [T]he prohibition of all the forms of violence must have a legislative basis. The prohibition must cover all forms of violence regardless of where it occurs or the identity of the alleged perpetrator. Furthermore the sanctions available must be adequate, dissuasive and proportionate.[108]

There are many elements of this decision that are interesting, including the requirement imposed to have a legislative basis for the rights protected within the ESC(R) and the positive obligation imposed on the State to have an appropriate system of sanctions. But what is perhaps of most relevance at this point is to assess the outcome of this decision. The decision was referred to the Committee of Ministers who failed to adopt a recommendation but instead adopted a resolution.[109] According to this resolution, the Committee of Ministers

> [t]akes note of the intention of the Department of Health and Children to seek legal advice in relation to amending the regulations to make

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[104] Section 24 of the Non-Fatal Offences Against the Person Act 1997 prohibits teachers from using physical chastisement of pupils; Child care (Pre School services) Regulations 1996 and (Amendment) Regulations 1997 prohibit the use of corporal punishment in pre-school, Section 58 of the Child Care Act 1991 prohibits certain categories of child carer from using corporal punishment; Section 201 Children Act 2001 also prohibits corporal punishment.

[105] It was alleged that those in *loco parentis* could include foster care, residential homes, and in some instances child-minders.

[106] Cullen (2005) (n 12) 75.

[107] *World Organisation against Torture (OMCT) v Ireland* (n 103) [40].

[108] ibid [64].

[109] 'Resolution ResChS(2005)9' (8 June 2005).

> more explicit the prohibition of corporal punishment of children in care, and on the need for any change required in primary legislation. Takes note of the intention of the government to keep the introduction of an outright ban on corporal punishment under review.[110]

This resolution hardly equates to the decision of the Committee and is incredibly deferential to the state party. Moreover, for some time there was little or no response to this decision by the relevant State Party. In its periodic reports Ireland was asked to address the progress in this area and for twelve years Ireland remained in 'non-conformity on the ground that corporal punishment is not explicitly prohibited in the home'.[111] In late 2015 the Irish Government finally passed legislation removing the defence of reasonable chastisement.[112] This action was taken 12 years after this action commenced, while disappointing, and indicative of the fact that the enforcement mechanisms are weak – it is equally clear that they are not entirely without teeth.[113]

That concern noted it must be acknowledged that in the majority of cases the Committee of Ministers do not contest the content of the Committee's decisions and equally it is clear that the Committee considers its decision to be a legally binding interpretation of the Charter. Further, as Bell notes, this is a collective process where '"compliance with the decisions is ultimately is an ongoing process.'[114] Equally, Quinn suggests that 'it would be a mistake to telescope the value of the Charter into an analysis of the outcomes it could legally drive'.[115] Rather he suggests that the value of the ESC(R) is 'how effectively it can become an expositor of social values'.[116] It is this author's contention that it would be unfortunate if the case law of the Committee became no more than an 'expositor of social values'. While performing an educative role is important, arguably it is also crucial that these cases drive legal change.

6. Conclusion

There are a number of distinct findings from the review of Article 15 and 17 of the ESC(R). The first significant finding is that there is a significant overlap of the material scope of both articles. Additionally, the failure to ratify Article 15 will ensure that the

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[110] ibid.

[111] European Committee of Social Rights, *European Social Charter (Revised) Conclusions 2011 - Volume 2 (France, Georgia, Ireland, Italy, Lithuania, Malta, Republic of Moldova, Netherlands)* (Council of Europe Publishing 2013).

[112] Children First Act 2015 (Ireland).

[113] It was also evident in the decision of *AEH v France* (n 41) that France had taken significant actions on the basis of the previous decision of *Autism Europe v France* (n 37).

[114] Bell, 'Combating Discrimination through Collective Complaints under the European Social Charter' (n 85) 18.

[115] Quinn (n 40) 283.

[116] Quinn (n 40) 283.

right to education of a child with a disability will be assessed under Article 17.[117] In the case law to date it has been established that when considering the education rights of children with disabilities, Article 17 is guided by the philosophy of Article 15.

Article 15 is imbued with the concepts of non-discrimination, with references to equal citizenship, 'independence, social integration and participation in the life of the community.'[118] This means in practice there is a strong presumption in favour of mainstream educational provision for children with disabilities; this presumption is evident in the cases decided to date. While there is a presumption in favour of mainstream education, there is an express acceptance that segregated or separate provision may be necessary on occasion. The Committee have held that in order for education to happen in a forum other than the mainstream, a variety of factors need to be considered, including 'the type of disability concerned, how serious it is and a variety of individual circumstances to be examined on a case-by-case basis.'[119] Thus it may be assumed that any automatically exclusionary practices will fall foul of the obligations contained in the Charter.

Articles 15 and 17 taken together or separately impose explicit and demanding obligations on States to proactively vindicate the right to education protected by these articles. The Committee in its Digest of Jurisprudence required States Parties to be able to 'demonstrate that tangible progress is being made in setting up education systems which exclude nobody.'[120] The significance of that onerous obligation was perhaps most evident in the decision in *AEH v France.*[121]

Additionally the Committee in its case law to date has shown a willingness to look beyond enacted positive law that appears on its face to accord with the requirements of the ESC(R) but has assessed the *de facto* position to determine compliance.[122] Effectively the issue is not about legislating for the rights within the ESC(R) but it is about the effective implementation of those guaranteed rights. All of these cases serve to emphasise the argument that the extent of protection afforded to the right to education for children with disabilities far exceeds that provided for by the more famous sibling (ECHR).

The most problematic element of the ESC(R) must relate to the enforcement procedures. It is contended by many that they lack the necessary teeth to drive legal change, or at least timely change. It is contended here that the case law does result in change – but slow change. This is perhaps best evidenced in the decision of *AEH v*

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[117] European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights* (n 17) 121; European Committee of Social Rights, 'Conclusions 2005' (Bulgaria)' (n 35) 66.
[118] *Autism Europe v France* (n 37) [48].
[119] *AEH v France* (n 41) [78].
[120] *Digest of the Case Law of the European Committee of Social Rights* (n 17) 112.
[121] *AEH v France* (n 41).
[122] *Autism Europe v France* (n 37); *AEH v France* (n 41); *MDAC v Bulgaria* (n 18).

France where France highlighted the extensive actions taken by that State on foot of the earlier case *Autism v France*. So notwithstanding the criticisms of the collective complaint procedure and its apparent lack of teeth, it is undoubted that these decisions do result in change, albeit not at the pace one would hope for. While the enforcement is undoubtedly problematic, there are other positive findings that point to the potential of the ESC(R) mechanisms to bring about change. Of particular note, the introduction of an explicit article on non-discrimination to the ESC(R) has resulted in a rich vein of equality case law, thus reflecting 'the heightened importance the drafters paid to the principle of non-discrimination'.[123]

Article E very clearly reflects Article 14 ECHR in both wording and applicability. Like Article 14, Article E does not constitute an autonomous right which gives rise to an independent ground for a complaint. It is always necessary to invoke Article E in conjunction with another substantive provision of the Charter. As both Article 15 and 17 are relevant to the right to education for children with disabilities, the parasitic nature of Article E is unproblematic. That noted, this may prove more problematic in the development of a body of equality jurisprudence generally. As with Article 14, Article E has been interpreted to ensure that people with disabilities are covered by the scope of this article by means of the phrase 'or other status'.[124] While there are evident similarities between Article E and Article 14 ECHR, the obvious difference lies in the interpretation of the two provisions.

Article E has benefited from a robust interpretation that from the outset accepted that the provision covered both direct and indirect discrimination.[125] Additionally, the Committee has shown a willingness to impose strong positive obligations on State Parties to respect human difference and to respond to that difference 'to ensure real and effective equality.'[126] It is evident that the level and nature of the duty imposed by the ESC(R) contrasts significantly from those imposed by the ECHR. Additionally while the Committee has yet to expressly base a decision on the failure to provide reasonable accommodation, it is suggested here that the mood music from the Committee suggests that this will be positively received. For example, even the dissentients Leppik and Schlachter accepted the principle that an unjustified failure to provide reasonable accommodation for people with autism in the exercise of their right to education would be discriminatory.[127] The Committee in *AEH v France* ultimately determined that there had been direct discrimination against the applicants. As the Committee grapple with the notion of a collective right to reasonable accommodation, it is hoped that they look to both the CRPD and the emerging jurisprudence from the CRPD Committee to guide

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[123] *Autism Europe v France* (n 37) [51].
[124] ibid see also; *AEH v France* (n 41); *MDAC v Bulgaria* (n 18).
[125] *Autism Europe v France* (n 37) [52].
[126] ibid.
[127] *AEH v France* (n 41) [35].

them in their interpretation of the duty to accommodate specifically and more importantly on the right to inclusive education.