

# Challenges of Implementation of the Revised European Social Charter Standards in Poland – Selected Issues

Monika Smusz-Kulesza\*

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**Summary:** After having joined the Council of Europe on 26 November 1991, Poland ratified the European Convention on Human Rights in 1993 and the 1961 European Social Charter on 25 June 1997. Concerning the Charter, Poland accepted 58 of the 1961 Charter's 72 paragraphs. It has signed, but not yet ratified the Revised European Social Charter. Taking the perspective of the Additional Protocol Providing for a System of Collective Complaints, Poland has neither signed, nor ratified the document. Following the reform of the European Social Charter system introduced in September 2022, the European Committee of Social Rights adopted a decision to implement the procedure on non-accepted provisions in respect of all State Parties to either Charter, in a reinforced manner. The procedure now provides for submission of written information by States Parties in accordance with a pre-established calendar, and additional bilateral meetings when it is deemed to represent an added value. In case of Poland, as a party to 1961 Charter only, the mechanism was introduced in 2024 for the first time and shall serve as an opportunity to identify consistencies and non-consistencies with the Revised European Social Charter standards both in the legislative framework and its implementation. The aim of this article is to discuss the challenges of enhancement of protection of social rights in Poland in the light of the Revised European Social Charter standards.

**Key words:** European Social Charter; Poland; social rights; ratification; collective complaints; non-accepted provisions; right to strike; moral harassment

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\* PhD in law, assistant professor in the Chair of European, International and Collective Labour Law at the University of Lodz, Poland, International Consultant of the Council of Europe in social rights, Judge in The Regional Court of Lodz, lecturer of the National School of Judiciary and Public Prosecution in Poland. Contact email: mkulesza@wpia.uni.lodz.pl.

## 1. Introductory remarks – Poland vis-à-vis the European Social Charter

The European Social Charter is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which refers to civil and political rights. No other legal instrument at pan-European level provides such an extensive protection of everyday human rights related to employment, housing, health, education, social protection and welfare. The Charter lays specific emphasis on the protection of vulnerable persons such as elderly people, children, people with disabilities and migrants requiring that enjoyment of all the abovementioned rights be guaranteed without discrimination. It is therefore seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture.

The history of the European Social Charter knows three major milestones. The initial European Social Charter was adopted in 1961<sup>1</sup>. The document is the result of nearly 10 years of preparatory work in the Council of Europe and with the Member States. Then, after about 30 years, in the late 1980s and early 1990s, a political and legal process to modernise the Charter and to increase its impact began. In 1988, first the Additional Protocol<sup>2</sup> added new rights to the 1961 Charter's catalogue increasing its number from 19 to 23 and afterwards, the 1991 Protocol<sup>3</sup> improved the supervisory mechanism. The reform process culminated in 1996 with the adoption of the Revised European Social Charter,<sup>4</sup> which added a set of new rights while at the same time incorporating the basic content of the 1961 Charter and its protocols. In parallel, in 1995, Additional Protocol<sup>5</sup> providing for a system of collective complaints was adopted to strengthen the monitoring system of the Charter.

Currently, both the 1961 Charter and the Revised Charter co-exist and they will be binding in parallel until all State Parties will have adopted the Revised Charter. Today, 42 out of the Council of Europe's 46 member states<sup>6</sup>, have rat-

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<sup>1</sup> The European Social Charter (CETS No. 35), for the text see: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b642>

<sup>2</sup> Additional Protocol to the European Social Charter (ETS No. 128), for the text see: <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=128>

<sup>3</sup> Protocol amending the European Social Charter (ETS No. 142), for the text see: <https://rm.coe.int/168007bd24>

<sup>4</sup> For the 1996 Charter text see <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93>

<sup>5</sup> Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158), for the text see: <https://rm.coe.int/168007cdad>

<sup>6</sup> The countries which still have neither ratified the 1961 Charter nor the Revised Charter are Liechtenstein, Monaco, San Marino and Switzerland.

ified either the 1961 Charter (7 states) or the Revised Charter (35 states).<sup>7</sup> As this process continues, hopefully all states, including Poland, will be bound by the Revised Charter at some point in the future.

From the perspective of ratification, the European Social Charter is based on a system, which enables States, subject to certain minimum requirements, to choose the provisions they are willing to accept as binding international legal obligations. The system is provided for by Article 20 of the 1961 Charter and Article A of the Revised European Social Charter and allows states, at any time subsequent to ratification of the treaty, to notify the Secretary General of their acceptance of additional articles or paragraphs. It is in the spirit of the Charter for States to progressively increase their commitments, tending towards acceptance of additional and eventually all provisions of the Charter where possible, as opposed to an *à la carte* stagnancy.

The legally mandated body to interpret the provisions of the Charter is the European Committee of Social Rights – a non-judicial expert body consisting of 15 independent experts in the field of social rights. The Committee develops its interpretation based on international legal principles by looking at the object and purpose of the Charter perceived as a living instrument which is able to address current problems. The ESC is monitored by the ECSR through monitoring procedures – the reporting procedure and the collective complaints procedure for assessing the situation in the States Parties from the perspective of accepted provisions and the complimentary non-accepted provisions procedure for monitoring the situation in the States Parties from the perspective of those provisions, that have not been accepted yet.

The situation of Poland vis-à-vis the European Social Charter seems not to be adequate to the country's possibilities and also not reflecting its current place in the social rights landscape of Europe. Poland ratified the 1961 European Social Charter on 25 June 1997 accepting 58 of the Charter's 72 paragraphs. Since 1997 not much has changed<sup>8</sup>. Till now, the country has not accepted the following 1961 Charter's provisions: Article 2§2, Article 4§1, Article 6§4, Article 7§§ 1, 3 and 5, Article 10§§ 3 and 4, Article 13§§ 1 and 4, Article 14§2, Article 18§§ 1, 2 and 3. Furthermore, it has neither signed nor ratified the 1988 Additional Protocol. Currently Poland is one of seven countries bound by the 1961 Charter, as it has signed, on 25 October 2005, but not yet ratified, the Revised European Social Charter. From the perspective of monitoring procedures, Poland is assessed only

<sup>7</sup> A detailed chart of signatures and ratifications can be found at the European Social Charter website, <https://rm.coe.int/16806f399d> (accessed 15 December 2024).

<sup>8</sup> Poland ratified the Amending Protocol to the Charter on 25 June 1997.

under the Reporting Procedure, as it has neither signed nor ratified the Additional Protocol providing for a system of collective complaints.

From the perspective of the Revised European Social Charter's provisions, it shall be noted that pursuant to Article A, each of the Parties undertakes to consider itself bound by at least six of the following nine articles of Part II of the 1996 Charter: Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20 and to consider itself bound by an additional number of articles or numbered paragraphs of Part II of the Charter which it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs. The articles or paragraphs selected shall be notified to the Secretary General of the Council of Europe at the time when the instrument of ratification, acceptance or approval is deposited. Any Party may, at a later date, declare by notification addressed to the Secretary General that it considers itself bound by any articles or any numbered paragraphs of Part II of the Charter which it has not already accepted. No Contracting Party to the European Social Charter or Party to the Additional Protocol of 5 May 1988 may ratify, accept or approve the 1996 Charter without considering itself bound by at least the provisions corresponding to the provisions of the European Social Charter and, where appropriate, of the Additional Protocol, to which it was bound.

Regarding the situation of Poland it shall be stressed that the country is currently bound by five out of the nine hard core articles of Part II of the Revised Charter – these being Articles 1, 5, 12, 16 and 19. In total, Poland under the 1961 Charter is bound by what corresponds to 8 full articles and 58 numbered paragraphs of Part II of the Revised Charter. In order to ratify the Revised Charter Poland would be required to accept at least one more hard-core article and either eight additional full articles or five additional numbered paragraphs of the treaty.

## **2. The procedure on non-accepted provisions in respect of Poland**

The procedure of examination of reports on non-accepted provisions is provided for by Article 22 of the 1961 Charter. According to this provision, the States Parties shall send to the Secretary General, at appropriate intervals as requested by the Committee of Ministers, reports relating to the provisions of Part II of the Charter which they did not accept at the time of their ratification or by subsequent notification. The Committee of Ministers shall determine from time to time in respect of which provisions such reports shall be requested and the form of the reports to be provided.

The Charter initially involved traditional reporting by States Parties. In 2002, following the Decision of the Committee of Ministers, it shifted to periodic reporting every five years on non accepted provisions of the revised Charter. Noting that the exercise was not yielding the expected results, considering the objective of strengthening the impact of the European Social Charter, the Committee of Ministers decided in December 2019 to invite “the ECSR to make full use of the opportunities for dialogue offered by Article 22 and to include in this exercise a dialogue with the member States that are not yet Party to the revised Charter, with a view to encouraging them to ratify it”<sup>9</sup>. On this basis, in September 2022, the ECSR adopted a decision to henceforth implement the procedure on non-accepted provisions in respect of all State Parties to either Charter, in a reinforced manner<sup>10</sup>. The procedure now provides for submission of written information by States Parties in accordance with a pre-established calendar, and additional bilateral meetings when it is deemed to represent an added value.

Since the objective of improving the implementation of social rights as a whole entails a progressive strengthening of member States’ commitments under the Charter, as implied by the Committee of Ministers in its decision of 15 March 2023, non-acceptance of provisions should be an exception, not the rule. The binding scope of the accepted provisions relates to the modalities and extent of monitoring under the Charter, which does not detract from their nature as human rights. Consistent with the tenet that social rights are human rights and therefore universal, indivisible and interdependent, the ultimate goal is for States to commit to all the provisions of the Charter and not accepting certain provisions should on no account be seen as a permanent state of affairs.

The procedure on non-accepted provisions had never been applied in respect of Poland before the year 2024. Therefore, ‘The information on the state of Polish law in the light of the provisions of the European Social Charter not ratified by Poland and the provisions of the Social Charter amending the relevant provisions of the 1961 Charter (articles 1 to 19) and its new provisions (articles 20 to 31)’<sup>11</sup> (hereinafter: Polish Report) submitted by Polish authorities in 2024 is the first Polish report on the situation in the country from the perspective of non-accepted provisions, based on the adjusted procedure.

<sup>9</sup> Decision CM/Del/Dec(2019)1363/4.1c of 11 December 2019. Available at: <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Frm.coe.int%2Fnative%2F0900001680993bba&wdOrigin=BROWSELINK>

<sup>10</sup> See more on the 2022 reform at: <https://www.coe.int/en/web/european-social-charter/reform-process-of-the-european-social-charter>

<sup>11</sup> Text accessible at: <https://rm.coe.int/the-first-national-report-on-the-non-accepted-provisions-of-the-europe/1680b168cf>

In terms of the first-time applied procedure, Poland was invited on 9 November 2023 to submit written information before 31 March 2024. The requested written information was registered on 19 July 2024 and subsequently published on the CoE website. No comments on the national report were delivered. The Committee decided to request a meeting with Polish authorities and social partners on the situation in law and practice in respect of the non-accepted provisions. The meeting was held on 28 – 29 October 2024, in Warsaw. The first examination focused on the following non-accepted provisions of the Charter: the right to just conditions of work – public holidays with pay (Article 2§2); the right to just conditions of work – night work (Article 2§7); the right to safe and healthy working conditions – health and safety regulations (Article 3§2); the right to safe and healthy working conditions – occupational health services (Article 3§4); the right to a fair remuneration – decent standard of living (Article 4§1); the right of children and young persons to protection – prohibition of employment under the age of 15 (Article 7§1); the right of children and young persons to protection – prohibition of employment during compulsory education (Article 7§3); the right to information and consultation (Article 21); the right to dignity at work – sexual harassment (Article 26§1); and the right to dignity at work – moral harassment (Article 26§2).

After examining the written information provided by Poland and the results of the subsequent meetings with the authorities and social partners, the European Committee of Social Rights is expected to prepare „First Report on the Non-Accepted Provisions of The European Social Charter. Poland” that shall be published on the Council of Europe website in 2025<sup>12</sup>.

Meanwhile, the analysis of Polish Report in the light of the European Social Charter’s standards and the case-law of the European Committee of Social Rights leads to the conclusion that there are strong basis for a favourable evaluation with respect to the possible immediate acceptance of the Revised European Social Charter by Poland. However, the Report seems to reveal also some important inconsistencies and challenges in the assessed area. The most challenging provisions seem to be Articles 6§4, 7§3, 13§1, 13§4, 18§1, 26§2, 30, 31§1, 31§2 and 31§3. In case of the above-enumerated provisions, though significant progress of the legal and policy framework can be observed, Poland shall still continue its efforts to remove the remaining obstacles in order to make the acceptance of these Articles possible in the upcoming future.

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<sup>12</sup> At the date of writing this paper the Report on the Non-Accepted Provisions of The European Social Charter regarding Poland has not been published.

### 3. Challenges related to the implementation of the right to collective action

The exercise of the right to bargain collectively (Article 6§2) and the right to collective action (Article 6§4) represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter, including for example those relating to just conditions of work (Article 2), safe and healthy working conditions (Article 3) or fair remuneration (Article 4).

Protecting the right to collective action under the Charter pursues the objective of solving collective conflicts. As long as such objective is effectively ensured in practice, equivalent means to this end may be established<sup>13</sup>.

Article 6§4 of the Charter guarantees the right to strike and the right to request a lockout. The recognition of this right may result from the law or from case law. In the latter case, the decisions of the national courts may not restrict the right to strike too much, and in particular intervention by the national courts, cannot reduce the right to strike to the point of affecting its very substance and depriving it of its effectiveness<sup>14</sup>. The opportunity and the modalities of the strike constitute a free choice of workers and unions.

As regards the permitted objectives of collective action, Article 6§4 applies to conflicts of interest, for example, disputes concerning the conclusion of a collective agreement. It does not confer rights in the event of legal conflicts (i. e. generally disputes concerning the existence, validity or interpretation of an agreement or the breach of an agreement) or conflicts of a political nature. Political strikes are not covered by Article 6<sup>15</sup>.

The right to strike may be limited<sup>16</sup>. A limitation on this right is possible, however, only if it falls within the limits set out in Article G, which provides for restrictions on the rights guaranteed by the Charter. Pursuant to Article G, the limitations are acceptable if they are prescribed by law, pursue a legitimate aim and are necessary in a democratic society to ensure respect for the rights and freedoms of others or to protect public order, national security, public health and morality.

The prohibition of certain types of collective action, or even the establishment by law of a general limitation on the right to take collective action with a view to blocking the way to initiatives with illegitimate or abusive aims (which, for

<sup>13</sup> ECSR, Conclusions XX-3 (2014), Germany, HUDOC.

<sup>14</sup> ECSR, Conclusions VIII (1984), Statement of Interpretation on Article 6§4, HUDOC.

<sup>15</sup> ECSR, Conclusions II (1971), Statement of Interpretation on Article 6§4, HUDOC.

<sup>16</sup> See more ECSR, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on admissibility and the merits of 3 July 2013, § 119, HUDOC.

example, have nothing to do with the exercise of workers' rights or relate to discriminatory objectives), are not necessarily contrary to Article 6§4 of the Charter. In this context, excessive or abusive forms of collective action, such as prolonged blockades, which could impede the maintenance of public order or unduly restrict the rights and freedoms of others (in particular the right to work of other employees of the enterprise or the right of employers to engage in gainful activity) may be limited or prohibited by the legislator<sup>17</sup>.

With regard to restrictions on sectors essential to the community, a ban on strike is presumed to pursue a legitimate aim to the extent that a work stoppage could endanger public order, national security and/or public health. However, an outright ban on strikes in a sector considered essential – especially when it is defined in broad terms, for example: energy or health – is not considered to be a measure proportionate to the requirements of the sectors concerned. At most, the introduction of a minimum service in these sectors may be deemed to be in accordance with Article 6§4<sup>18</sup>.

As regards the right of public servants to strike, the Committee recognises that, under Article G of the Revised Charter, the right to strike of certain categories of public servants may be restricted, including members of the police and armed forces, judges and senior civil servants<sup>19</sup>. Restrictions to the right to strike of certain categories of public servants, for example those whose duties and functions, given their nature or level of responsibility are directly affecting the rights of others, national security or public interest may serve a legitimate purpose in the meaning of Article G<sup>20</sup>.

On the other hand, the Committee takes the view that a denial of the right to strike to public servants as a whole cannot be regarded as compatible with the Charter. Allowing public servants only to declare symbolic strikes is not sufficient<sup>21</sup>.

<sup>17</sup> ECSR, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on admissibility and the merits of 3 July 2013, § 119, HUDOC.

<sup>18</sup> ECSR, Matica Hrvatskih Sindikata v. Croatia, Complaint No. 116/2015, decision on the merits of 21 March 2018, § 114; Conclusions XVII-1 (2006), Czech Republic; Matica Hrvatskih Sindikata v. Croatia, Complaint No. 116/2015, decision on the merits of 21 March 2018, § 114; see also Conclusions XVII-1 (2006), Czech Republic; Conclusions 2018, Ukraine, HUDOC.

<sup>19</sup> ECSR, European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, decision on the merits of 12 September 2017, § 113, citing Conclusions I (1969), Statement of Interpretation on Article 6§4, HUDOC.

<sup>20</sup> ECSR, Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" and European Trade Union Confederation (CES) v. Bulgaria, Complaint No. 32/2005, decision on the merits of 16 October 2006, § 45, HUDOC.

<sup>21</sup> ECSR, European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, decision on the merits of 12 September 2017, § 113, citing Conclusions I (1969),

With regard to the requirements of the strike procedure, according to the Committee, the exercise of the right to strike may be subject to the prior approval of a certain percentage of the workers, provided that the voting method, quorum and/or majority required are not such as to unduly limit the right to take industrial action<sup>22</sup>.

With regard to the effects of the strike, there can be no adverse consequences for workers, including dismissal in retaliation or economic sanctions. Indeed, under the terms of Article 6§4, the strike cannot be considered as a violation of the strikers' contractual obligations resulting in the termination of the employment contract. It must be accompanied by a ban on dismissal. In addition, deductions from strikers' wages may not exceed the lost wages, i. e. the wages that would normally have been received for the strike period<sup>23</sup>.

Finally, in the Committee's view, a general prohibition of lock-outs is contrary to Article 6§4, although the latter is not protected to the same degree as the right to strike.

Regarding the Polish perspective, according to the Act of 23 May 1991 on the resolution of collective disputes<sup>24</sup>, the right to organize employee strikes and other forms of protest, within the limits specified in the Act, is granted to trade unions. In defense of the rights and interests of employees, forms of protest action other than strikes may be used, which do not threaten human life or health, without interrupting work, provided that the applicable legal order is observed. This right may also be exercised by employees who do not have the right to strike. Additionally, in defense of the rights and interests of employees who do not have the right to strike, a trade union operating in another workplace may organize a solidarity strike, for a period not longer than half a working day.

Employees of essential services (transport, water supply, gas, electricity, others) and civilian employees of the army have the right to strike, provided that the cessation of work at work stations, devices and installations does not threaten human life and health or state security. Due to the public good, it is inadmissible to stop work as a result of strike action at work stations, devices and installations if the cessation of work threatens human life and health or state security – the ban does not apply to the entire establishment, but only to individual positions.

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Statement of Interpretation on Article 6§4; Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" and European Trade Union Confederation (CES) v. Bulgaria, Complaint No. 32/2005, decision on the merits of 16 October 2006, §§ 44–46, HUDOC.

<sup>22</sup> ECSR, Conclusions XVII-2 (2005), Latvia; Conclusions II (1971), Cyprus; Conclusions XVII-1 (2004), Czech Republic, HUDOC.

<sup>23</sup> ECSR, Conclusions I (1969), Statement of Interpretation on Article 6§4, HUDOC.

<sup>24</sup> Official Journal 2020, nr 123.

The right to strike does not apply to members of the civil service corps (employees, officials), employees employed in state authorities, government administration, local government administration, courts and prosecutor's offices, regardless of the position and type of tasks performed. The decisive factor is the fact of employment in a given institution, and not the influence of the person employed in a given position on ensuring public order, national security, protection of public health or good customs.

Due to their specific tasks and status, the right to strike does not apply to officers and civilian employees of the Internal Security Agency, the Foreign Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the State Security Service, the Customs and Fiscal Service, the Police and the Armed Forces of the Republic of Poland, the Prison Service, the Border Guard, the Marshal's Guard and organizational units of fire protection.

The right of employers to take action in the event of a conflict of interests (lockout) is not regulated.

In the light of the requirements of Article 6§4 ESC, it shall be noted that the right to strike of some groups of employees in Poland is limited to the extent which cannot be justified under the Charter. Especially, the fact that the right to strike does not apply to members of the civil service corps (employees, officials) and employees of state authorities, government administration, local government administration, courts and prosecutor's offices, regardless of the position and type of tasks they perform, is contrary to the standards of the Charter and so poses important challenge from the point of view of the acceptance of Article 6§4 ESC in the nearest future. Amendments to the above-mentioned regulations shall be introduced and restrictions to the right to strike of certain categories of public servants, at least those whose duties and functions, given their nature or level of responsibility are not directly affecting the rights of others, national security or public interest shall be lifted before Polish authorities decide to accept Article 6§4 of the Revised Charter.

#### **4. Challenges related to the implementation of the prohibition of young persons' employment during compulsory education**

Pursuant to Article 7§3 ESC, with a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education.

Article 7§3 requires States Parties to ensure that children still subject to compulsory education who are employed are not deprived of the full benefit of their education. Only light work is permissible for schoolchildren under this provision. The notion of “light work” is identical to that under article 7§1. Adequate safeguards must be in place to allow the authorities (labour inspectorate, social and education services) to protect children from work which could be excessive<sup>25</sup>, including work done at home, for which States Parties are also required to monitor the conditions under which it is performed in practice<sup>26</sup>.

Pursuant to the Committee’s case-law, during school term, the time during which children may work must be limited so as not to interfere with their attendance, receptiveness and homework.

During school holidays children should not perform light work for more than 6 hours per day and 30 hours per week in order to avoid any risks that the performance of such work might have for their health, moral welfare, development or education<sup>27</sup>.

In order not to deprive children of the full benefit of their education, States Parties must provide for a mandatory and uninterrupted period of rest during school holidays. Its duration shall not be less than 2 consecutive weeks during the summer holidays.

In the light of the Constitution of the Republic of Poland and the Act of 14 December 2016 Education Law<sup>28</sup>, education is compulsory until the age of 18. A child’s school obligation begins at the beginning of the school year in the calendar year in which the child turns 7 and lasts until the completion of primary school, no longer than until the completion of 18 years of age.

The Labor Code states that a juvenile employee is obliged to continue their education until the age of 18, in particular they are obliged to: continue their education in the field of primary and secondary school, if they have not completed such school; continue their education in the field of secondary school or in extracurricular forms.

The Labor Code imposes on the employer the obligation to enable the juvenile to fulfill the obligation of further education, including taking time off from work for the time needed to participate in training classes.

The weekly working time of a young person up to 16 years of age, during school term, may not exceed 12 hours, and the daily working time may not

<sup>25</sup> ECSR, International Commission of Jurists against Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, § 32, HUDOC.

<sup>26</sup> CoE, Digest of the case law of the European Committee of Social Rights, Council of Europe, June 2022, p. 96, available at: <https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd>

<sup>27</sup> ECSR, Conclusions XVII-2 (2005), The Netherlands, HUDOC.

<sup>28</sup> Official Journal 2024, nr 737.

exceed 6 hours. On the day of participation in school classes, the working time of a young person may not exceed 2 hours. The working time of a young person during school holidays may not exceed 7 hours per day and 35 hours per week.

The working time of a young person aged 16-18 may not exceed 8 hours per day. The working time includes the time spent studying in the amount resulting from the compulsory school curriculum.

The young person is entitled to at least 48 hours of uninterrupted rest each week, including Sunday.

In the light of the requirements of Article 7§3 ESC, it shall be noticed that situation in Poland is not in conformity with the standards of Article 7§3 on the basis that children who are subject to compulsory schooling are allowed to perform light work during school holidays for more than 6 hours per day and 30 hours per week. Therefore, before considering the acceptance of Article 7§3, Polish authorities shall amend the Labour Code and reduce the working time of children who are subject to compulsory schooling during school holidays to 6 hours per day and 30 hours per week the maximum.

## **5. Challenges related to the implementation of the right to dignity at work in the area of protection against moral harassment**

Article 26§2 of the Charter establishes the right to protection of human dignity against harassment creating a hostile working environment related to a specific characteristic of a person. States Parties are required to take all necessary preventive and compensatory measures to protect individual workers against recurrent reprehensible or distinctly negative and offensive actions directed against them at the workplace or in relation to their work, since these acts constitute humiliating behaviour<sup>29</sup>.

Irrespective of admitted or perceived grounds, harassment creating a hostile working environment characterized by the adoption towards one or more persons of persistent behaviours which may undermine their dignity or harm their career shall be prohibited and repressed in the same way as acts of discrimination<sup>30</sup>.

Awareness raising is needed. Harassment should be prohibited and repressed even when the harassing behaviour does not amount to discrimination. The Appendix to Article 26§2 specifies that States Parties have no obligation to enact legislation relating specifically to harassment. However, States Parties to the

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<sup>29</sup> ECSR, Conclusions 2003, Bulgaria, HUDOC.

<sup>30</sup> ECSR, 2282 Conclusions 2007, Statement of Interpretation on Article 26§2, HUDOC.

Revised Charter having accepted Article 26§2 shall ensure an adequate legal protection of employees against distinctly negative and offensive actions or conduct at work. This protection shall include the right to challenge the offensive behaviour before an independent body, the right to obtain adequate compensation and the right not to be discriminated for having pursued the respect of these rights<sup>31</sup>.

It must be possible for employers to be held liable in case of harassment involving employees under their responsibility, or on premises under their responsibility, when a person not employed by them (independent contractor, self-employed worker, visitor, client, etc.) is the victim or the perpetrator<sup>32</sup>. Furthermore, the effective protection of employees requires a shift in the burden of proof, making it possible for a court to find in favour of the victim on the basis of sufficient *prima facie* evidence and the personal conviction of the judge or judges<sup>33</sup>.

Under Article 26§2, victims of harassment must have effective judicial remedies to seek reparation for pecuniary and non-pecuniary damage. These remedies must, in particular, allow for appropriate compensation of a sufficient amount to make good the victim's pecuniary and non-pecuniary damage and act as a deterrent to the employer<sup>34</sup>.

Polish regulations provide protection against moral harassment by different means of legal protection, i. e. by prohibition of discrimination, protection of the right to dignity and prohibition of mobbing. From the perspective of the Charter's standards, the regulation of protection against mobbing seems to pose risk of not fulfilling Article 26§2 requirements.

Under the Labor Code<sup>35</sup>, mobbing means actions or behaviours concerning an employee or directed against an employee, consisting of persistent and long-term mobbing or intimidation of an employee, causing him to have a lowered assessment of his professional usefulness, causing or aimed at humiliating or ridiculing the employee, isolating him or eliminating him from the team of co-workers. Responsibility for mobbing rests in each case with the employer, regardless of whether he himself committed mobbing against the employee or other employees committed it. The employer is liable for cases of mobbing in the workplace and related to work.

<sup>31</sup> ECSR, Appendix to the European Social Charter (Revised) – European Treaty Series – No. 163; Conclusions 2005, Republic of Moldova, HUDOC.

<sup>32</sup> ECSR, Conclusions 2014, Finland, HUDOC.

<sup>33</sup> ECSR, Conclusions 2007, Statement of Interpretation on Article 26§2, HUDOC.

<sup>34</sup> ECSR, Conclusions 2014, Azerbaijan, HUDOC.

<sup>35</sup> Article 94(3)§2 of the act of 26.06.1974 Labour Code, Official Journal 2023, nr 1465.

The employer is obliged to counteract mobbing. The obligation to counteract mobbing is an obligation of diligent action, not an obligation of result. This means that the employer can be released from liability if in court proceedings he proves that he has taken real actions aimed at counteracting mobbing and, by assessing them objectively, their potential effectiveness can be confirmed.

The Labor Code does not regulate the liability of an employee who commits mobbing towards another employee, i. e. when there is no official dependence between them. Such matters are subject to regulations contained in the Civil Code and the Penal Code.

In the case of behaviours classified as mobbing, the employee who has suffered a health disorder may claim financial compensation from the employer for the harm suffered. An employee who was mobbed or terminated an employment contract as a result of mobbing has the right to claim compensation from the employer in an amount not lower than the minimum wage, established on the basis of separate provisions.

When mobbing results in the employee being dismissed from work, he or she may appeal, in accordance with the provisions on unjustified or unlawful termination of an employment contract by the employer, or on unlawful termination of an employment contract by the employer without notice: the employee may request either recognition of the termination as ineffective, or reinstatement to work and award of remuneration for the period of unemployment, or award of compensation.

The preventive actions taken by the State Labour Inspectorate are primarily information directed in the form of leaflets and brochures to the widest possible circle of recipients about the legal regulations concerning mobbing and sexual harassment, the rights of victims of such actions and bodies, institutions and non-governmental organizations providing legal and psychological assistance. Employees of the State Labour Inspectorate during personal and telephone duty hours provide legal advice, distribute educational materials, and also, during training for employers and social partners, promote knowledge in the field of mobbing and sexual harassment.

In the light of the requirements of Article 26§2 ESC, it shall be noted that current situation in Poland seems to be not in line with the Revised Charter's standards. Especially since the legal basis for the shift in the burden of proof in the harassment cases which fall out of the scope of harassment as a form of discrimination have not been established. What is more, pursuant to the Charter's standards it shall be possible for employers to be held liable in case of harassment involving employees under their responsibility, or on premises under their responsibility, when a person not employed by them (independent contractor, self-employed worker, visitor, client, etc.) is the victim or the perpetrator. Polish

regulations do not provide legal basis for such responsibility, which shall also be changed before the process of acceptance of Article 26§2 ESC not to expose the country to the Committee's conclusion of non-compliance.

## **6. Closing remarks – the perspective of acceptance of the Revised Social Charter by Poland**

The situation of Poland vis-à-vis the European Social Charter seems not to be adequate to the country's possibilities and ambitions and also not reflecting its current place in the social rights landscape in Europe. Poland ratified the 1961 European Social Charter in 1997 accepting 58 of the Charter's 72 paragraphs; since then not much has changed, as the country has not accepted any additional 1961 Charter's provisions and has not ratified the 1988 Additional Protocol. Currently Poland is one of the seven countries bound by the 1961 Charter assessed only under the Reporting Procedure, as it has not ratified the Additional Protocol providing for a system of collective complaints.

From the perspective of the Revised European Social Charter, the country is currently bound by five out of the nine hard core articles of Part II of the Revised Charter. In total, Poland under the 1961 Charter is bound by what corresponds to 8 full articles and 58 numbered paragraphs of Part II of the Revised Charter. In order to ratify the Revised Charter Poland would be required to accept at least one more hard-core article and either eight additional full articles or 5 additional numbered paragraphs of this treaty.

What shall be noted, after examining Polish Report and Polish legislative framework, a favourable evaluation can be expected from the European Committee of Social Rights with respect to the possible immediate acceptance of the Revised European Social Charter by Poland. Especially in the light of the Committee's interpretation according to which, the acceptance of the Revised European Social Charter's provisions, especially those which are considered particularly difficult to realise, such as, for example, Article 31§1, 31§2 and 31§3, does not always have to be based on the full legal conformity of the situation at the time of acceptance, but instead their acceptance may be the subject of a political decision and could be used to signal the aspiration of the State Party to realise the rights in question, given their crucial importance.

Concerning the required acceptance of at least one more hard-core article, Polish legislative framework and its implementation seems adequate to meet the requirements under Article 20 of the Charter. In this area, according to the Labor Code, any discrimination in employment, direct or indirect, including

on the basis of gender, is unacceptable. Employees have equal rights due to the equal performance of the same duties. This applies, in particular, to the equal treatment of men and women in employment. Employees should be treated equally in employment, including regardless of gender, in terms of: entering into and terminating employment relationships; employment conditions; promotion; access to training to improve professional qualifications. Employees have the right to equal pay for equal work or work of equal value. According to the Labor Code, provisions of employment contracts and other acts on the basis of which an employment relationship is established, violating the principle of equal treatment in employment, are invalid by operation of law. An employee whose employer has terminated their employment contract in breach of the provisions on the prohibition of discrimination in employment may file a claim with the labour court in the event of unjustified or unlawful termination or dissolution of the employment contract. In cases concerning a breach of the principle of equal treatment in employment, the reverse burden of proof rule applies, i. e. the burden of proving that there has been no breach of the principle of equal treatment rests with the employer. A person against whom the employer has violated the principle of equal treatment in employment has the right to compensation in an amount not lower than the minimum wage. The upper limit of compensation is not specified in the law.

Concerning the required acceptance of at least either eight additional full articles or 5 additional numbered paragraphs, Polish policy, legislative framework and its implementation seems adequate to meet the requirements under Articles 2§6, 4§1, 21, 25, 27§1, 27§2 and 27§3. In the areas regulated by the above-enumerated provisions, Poland implemented EU directives and has already adjusted its standards to European level.

Furthermore, Poland shall consider accepting the collective complaints procedure by making the declaration foreseen by Article D§2 of the Revised Charter. The collective complaints procedure is a good governance tool intimately linked to core democratic values and the rule of law. Full-fledged participation of the social partners and civil society, including the possibility for them to seek legal remedies for real or perceived injustices, is a defining characteristic of any functioning democracy. It is the duty of a democratic state governed by the rule of law to embrace the good governance tools available to it in order to access the best possible information to inspire its decision-making.