

Interview on the December 2006 European Committee of Social Rights decision *Marangopoulos Foundation v. Greece*

More than thirty years have passed since the adoption of the Collective Complaints System under the European Social Charter (ESC), a mechanism that has played a pivotal role in the protection of social rights across Europe. A landmark in this development was the case of the Marangopoulos Foundation for Human Rights (MFHR) v. Greece (Collective Complaint No. 30/2005), which was declared admissible by the European Committee of Social Rights on 10 October 2005 and decided on the merits on 6 December 2006. The Council of Europe recently recognized this decision as one of the most significant rulings demonstrating that the rights to health and to decent working conditions are fundamental human rights. On this occasion, the Marangopoulos Foundation for Human Rights (MFHR) is hosting an interview with Jean-Michel Belorgey, former President of the European Committee of Social Rights and rapporteur in the case MFHR v. Greece, who shares his reflections and experiences on the significance of the decision and on the evolution of the protection of social rights in Europe.

Jean-Michel Belorgey:

“I am particularly moved that, on the occasion of the twentieth anniversary of the 2006 decision of the European Committee of Social Rights, for which I served as rapporteur, and by which Greece was found to have violated its obligations under Articles 3 and 11 of the European Social Charter (the former concerning safety and health at work, the latter the right to health), you have invited me to share my recollections.

Twenty years have passed since then. Yet that decision continues to raise issues of enduring relevance, chiefly on two levels. First, what does the right to a healthy environment mean today—and what exactly do we mean by the term “healthy”? Moreover, how can that right be recognised and given concrete legal expression? Second, what lessons can be drawn from the experience of the collective complaints procedure before the European Committee of Social Rights and, more broadly, from the evolution of the Committee itself, its role within the Council of Europe, and the relationship between the Council of Europe and the European Union in the field of fundamental rights, whether civil, political, social or otherwise? All these are undoubtedly issues worthy of careful consideration. However, it would be preferable not to fragment the unity and continuity of fundamental rights, which has already been weakened over time, as illustrated by the rather peculiar distribution of responsibilities within the Council of Europe between the bodies responsible for civil and political rights and those dealing with environmental and social rights.”

[The decisions of the European Committee of Social Rights on admissibility (10 October 2005) and on the merits (6 December 2006) in the case *Marangopoulos*

***Foundation for Human Rights v. Greece* were delivered even before the collective complaints procedure had reached its first ten years of operation, that is, at a time when neither the European Social Charter nor, *a fortiori*, the collective complaints procedure enjoyed significant visibility in public opinion within the States Parties to the Charter. Could we today, twenty years after those decisions, consider that they have contributed to enhancing the standing of the Charter and the collective complaints procedure as effective and credible legal instruments for the protection, in Europe, of social rights as human rights?]**

“Indeed, the 2006 decision was delivered at a time when the collective complaints procedure, established by the 1995 Additional Protocol to the 1961 European Social Charter—as a form of compensation for the absence of social rights from the 1950 European Convention on Human Rights—had not yet experienced the development it would undergo in the years that followed. That decision, together with a number of others, including another significant decision against Greece in 2011, in which the country was once again found in violation on account of measures adopted under pressure from the European Union, undoubtedly contributed to enhancing the visibility of the Charter. Nor was Greece the only State concerned. Other States, including France, were also found to have breached their obligations in areas such as labour law and the treatment of migrants and other vulnerable or marginalised groups. The principal advantage of the collective complaints procedure was that it enabled the Committee to examine cases brought at the initiative of the very holders of the social rights at issue. In this way, it became possible to identify situations in which rights that had been formally recognised were not implemented in practice—something that could not be adequately revealed through the system of States’ periodic reports. After all, any possibility of obtaining judicial protection for a recognised right presupposes that the right can be invoked before a national and/or international judge.”

[During the Committee’s examination of the admissibility of the complaint, the respondent Government contested the extent of its responsibility for the violation of the provisions of the Charter arising from the harmful effects on the health of the inhabitants of Kozani, Ptolemaïda and Megalopolis caused by lignite-based energy production plants located in those regions. In its decision on the admissibility of the complaint, the Committee appears to have attributed responsibility for the violation of provisions of the Charter to the Greek State in its dual capacity as both operator and regulator of the energy sector (see paragraph 14 of the admissibility decision). Do you consider that, in its decision on the merits of the complaint, the European Committee of Social Rights examined this dual responsibility of Greece for violations of the social rights guaranteed by the Charter (Article 11 in particular, which enshrines the right to health) in a balanced manner, or, on the contrary, that it examined responsibility predominantly in one of its two dimensions, and if so, which one?]

“In my view, Greece’s responsibility was established in both of the respects you mention: the State as operator and the State as regulator. However, it is primarily the

latter dimension that I consider to be of the greatest significance and to hold the most promising potential. This is because it is capable of applying irrespective of how energy production—or, more broadly, any economic activity, whether industrial, agricultural or service-based—is organised. The same applies to the regulation of environmental harm capable of threatening or damaging, directly or indirectly—including through climate change—the health of populations.

For the moment, however, let us confine ourselves to the issue of health. As regards the right to a healthy environment, I have very little doubt that it forms, to a large extent, part of the right to health, while at the same time extending beyond it, depending in particular on the breadth of meaning attributed to the concept of what is “healthy.” I do not recall that this penultimate assertion encountered any difficulty in being shared by the members of the Committee, who did not feel they were inventing a new right, but merely explicating one of the components of the right mentioned in Article 11 of the Charter, taking into account a dimension that posed no difficulty in grasping nuisances linked to modern technologies, more or less brutalist. Petros Stangos has, moreover, shown in a number of paragraphs of his admirable work *Shaping European Social Case Law: Decisions on Collective Complaints By The European Committee Of Social Rights* how, in this instance, the principle of proportionality was applied in order to assess that Greece’s general interest (energy independence, distribution of electricity supplies at an affordable cost to a broader population, etc.) could not be regarded as prevailing over the right to health of local residents.”

[Neither the 1961 European Social Charter nor the revised Charter of 1996 guarantees the right to a healthy environment. However, in its 2006 decision on the merits of the complaint, the Committee incorporated this right in a highly pragmatic manner into the normative content of the Charter, by interpreting Article 11 of the Charter, which guarantees the right to health. What motivated the European Committee of Social Rights in adopting this approach? Perhaps the quality of the arguments put forward by the complainant party and its perseverance in defending them? Possibly the Committee’s desire to pave the way, on behalf of all the institutions of the Council of Europe, for the legal recognition, at the European level, of the right to a healthy environment? Or was there another factor that prompted the Committee to act in this way, one that you yourself are in a position to know, given the central role you played in the ECSR’s decisions in the case *Marangopoulos Foundation v. Greece*?]

“Your question undoubtedly evokes, but in terms that do not entirely satisfy me, the reasoning I have just retraced. This reasoning was, in my view, very largely encouraged by the excellent quality of the arguments developed by the complainant party. Perhaps judges are also not indifferent to their own past. I had been my party’s delegate for environmental issues and had led a number of struggles, without great success, against the anti-ecologist allergy of certain comrades and leaders. I had also tried to argue that the right to an environment, not so much a “healthy” one as a quality one, could not be absent from a societal project seeking to remedy social inequalities, to the point that it

could well be considered a social right, perhaps even a civil and political right, or more precisely a fundamental right transcending those previous categories. From two brief meetings with Mrs. Marangopoulos, on the occasion of a conference in Athens on women's rights, I had moreover retained a deeply emotional memory.

But then, should one rejoice, or, on the contrary, should one be concerned that today, prompted by various resolutions of different bodies, there is talk of elaborating an autonomous text, or one presented as a supplement to the European Convention on Human Rights or to the Charter, in order to recognise one or more kinds of right(s) to the environment? I would tend to say provocatively: paper, yet more paper, but with what justiciability as a result? And are we sure that the idea of the environment being formed is not abusively narrow or excessively broad, influenced by prevailing trends? If one accepts that the environment is the set of natural and cultural conditions that can act upon living organisms and human activities, then the right to the environment and its protection are not only concerned with pollution and other sources of physical unhealthiness, but with various kinds of obstacles to the harmonious flourishing of individuals and communities: ugliness, impediments to a fulfilling social life, subjection to advertising or media harassment, including by operators in the hands of economic interests and/or holders of power.”

[In a lengthy section of the decision on the merits of the complaint in *Marangopoulos Foundation v. Greece*, namely the part concerning the alleged violation of Article 11 of the Charter referred to above (see paragraphs 204-215), the Greek Government's inaction and failure to prevent the negative environmental effects of lignite extraction and lignite-based energy production are denounced. However, the fact that, in the subsequent part of the decision (see paragraphs 216-221), the Government's acts and omissions are assessed by the Committee strictly in the light of the right to health suggests that the right to a healthy environment becomes effective within the framework of the Charter only insofar as a violation of the right to health is established. Is this interpretation of the European Committee of Social Rights' 2006 decision on the merits of the complaint correct? Could the Committee potentially adopt a stricter approach towards the Greek Government with regard to the environmental impacts of lignite extraction for energy production?]

“As to whether the Committee could, either in its 2006 decision or subsequently, have imposed more stringent requirements on the Greek Government concerning the environmental impacts of lignite mining, within the framework of—or in the light of—the right to health, I do not believe that such an approach could have been grounded in Article 11. Nor do I believe it would have been possible even if the concepts of health and of a healthy environment had been interpreted more broadly, as I suggested earlier, unless one were prepared to blur the boundaries between the right to health and other social rights—but which ones, exactly?—or even between social, civil and political rights. One might imagine that this is what the unveiling of a specialised international environmental instrument could aim at, but this does not seem to be the objective of the

embryonic projects circulating within the Council of Europe or elsewhere, including, I fear, within the French National Consultative Commission on Human Rights, so deeply rooted are the cleavages not only between bureaucracies but between representations.

In any event, I do not recall that, during my participation in the European Committee of Social Rights as member, president or general rapporteur, the opportunity arose to explore such possibilities, despite the extraordinarily favourable context created during that entire period by the arrival on the Committee of Luis Jimena Quesada and Petros Stangos, the executive secretariat of Régis Brillat, and then my replacement as president by Luis. But it must be said that this period did not last.

[Have the successive Greek Governments been subject, in the years following the public release of the decision, to the follow-up procedure concerning decisions on the merits of collective complaints, carried out by the Committee and applicable only to those States Parties that have accepted the Additional Protocol to the Charter providing for the system of collective complaints? Were the reports submitted by the successive Greek Governments within the framework of the follow-up to the *Marangopoulos Foundation v. Greece* decision regarded by the Committee as satisfactory with regard to Greece's compliance with the obligations arising from Article 11 of the Charter, in light of lignite extraction activities and energy production in the regions of Kozani, Ptolemaïda and Megalopolis?]

“I am by no means certain—although I have not verified the matter—that the examination of States’ periodic reports actually made it possible to determine whether Greece had complied with the obligations arising from the 2006 decision. That decision, however—and this marks an important difference from other decisions concerning Greece, France, and several other States—was subject to supervision by the Committee of Ministers with regard to its implementation. Such supervision is an essential condition for the effectiveness of the system. At the same time, however, it limits the powers of the European Committee of Social Rights, since it prevents the Committee from operating as a court with full jurisdiction.

Above all, however, the problem of the independence and competence of the members of the Committee began to arise in increasingly serious terms, a problem that Luis and I commented on candidly at the presentation in Strasbourg of Petros Stangos’s book. This problem reached its peak with the disqualification, without legal basis, of Carmen Salcedo in several cases, and with the obstacles placed in the way of the publication of dissenting opinions. The fact is (and this is the background that must be borne in mind) that a struggle has been underway between the European Union and the Council of Europe to gradually paralyse any autonomy and initiative of the latter in the social field, which the Union seeks to take over in its own way. Some of the authorities of the Council of Europe, and personally some members of the European Committee of Social Rights, are adherents of this posture. The European Court of Human Rights, even if it has sometimes been proactive in defending the rights of certain applicants, such as migrants in an irregular situation, was slow to commit to this approach and has shown little consideration for the European Committee of Social Rights and its case law. The

Court of Justice of the European Union had, at the time, been more open to dialogue with the European Committee of Social Rights, even while acknowledging that the (deliberate) poverty of the Charter of Fundamental Rights of the European Union was less suited, indeed even less so, including in terms of justiciability before both international and national courts, than the European Social Charter to serving as a basis for innovative attempts and for an understanding adapted to concrete realities of the scope of many social or related rights, including that of a harmonious environment. Hence the paradoxical or picturesque nature of the tribute reportedly paid on a recent anniversary to the 2006 decision of the European Committee of Social Rights by an official of the Council of Europe. My memories of such anniversaries (that of the revised Charter in 2006) are not uplifting, as I had suggested in an interview in November 2005:

“Celebrating is one thing; giving substance to the commitments enshrined in an international instrument, without allowing governments or judges to invoke the economic conjuncture of one crisis or another in order to downgrade social or related rights, is another. Good pupils perform all the better when they are encouraged, but also when their weaknesses, their compromises, and their deviations are not allowed to pass unnoticed by turning a blind eye to them.”