

European Social Charter

Cycle XXI-2 (2017)

Period 01/01/2012 – 31/12/2015

Comments by the Galician Unions' Confederation (CIG) to the 29th report presented by the Spanish Government to the European Committee of Social Rights, in relation to the Kingdom of Spain's fulfilment of the European Social Charter

The 29th report, which was to be submitted by the Spanish Government on 31/10/2016, should concern the accepted provisions relating to Thematic Group 2 "Health, Social security and social protection", namely:

- the right to safe and healthy working conditions (Article 3),
- the right to protection of health (Article 11),
- the right to social security (Article 12),
- the right to social and medical assistance (Article 13),
- the right to benefit from social welfare services (Article 14),
- the right of elderly persons to social protection (Article 4 of the Additional Protocol 23).

In addition, the report should provide the information required by the Committee in the framework of Conclusions XX-4 (2015) relating to Thematic Group 4 "Children, families, migrants" (Articles 7, 8, 16, 17, 19 of the 1961 Charter), in the event of non-conformity for lack of information.

In fulfilment of what is established by the European Social Charter's Article 21, the Spanish Government sent a copy of its report to the workers' organisations. The

Galician Unions' Confederation (CIG, by its initials in Galician) presents the following observations, with regard to the thematic group of rights considered in the report.

Previous warning about the non-official version of the European Social Charter published by the Spanish Government

Our allegations are preceded by this previous warning, which we also consider advisable to be known by the Committee because of its importance. The ratification by the Kingdom of Spain of the European Social Charter was made through an instrument of ratification of 29 April 1980, published in the Official Gazette (*"Boletín Oficial del Estado"*) of 26 June 1980. As can be observed in the aforementioned Official Gazette, Spain has not published the official version of the European Social Charter, since the published text is only in Spanish, so we understand that it is the publication of an unofficial version. This justifies, from our point of view, the need to correct this legal-diplomatic mistake.

The only two official languages of the Council of Europe are English and French, therefore all official documents issued by the Council of Europe appear in both languages, as is the case with the European Social Charter. With this, we would like to point out that a correct ratification of the aforementioned Charter by the Spanish State demands that its official publication to be in the authentic versions (that is, in either or both of these two official languages) and not, as has been made, in a translation into Spanish (that is, in an unofficial version). The comparative study of what other States-members of the Council of Europe have done shows that the Spanish State has not acted correctly, for example, and unlike in Spain, Portugal has published in its *"Diário Oficial da República"* the authentic (or official) version in French of the European Social Charter (in addition to an

unofficial version in Portuguese), Italy has published in its *“Gazzetta Ufficiale della Repubblica”* only the authentic (or official) version in French, and France has published in its *“Journal officiel de la République”* the authentic (or official) version in French. In so doing, these States show scrupulous respect for the value legally required of authentic (or official) documents, and also avoid further problems of interpretation and application of the European Social Charter, derived from the internal use of a non-official version.

Although the Spanish publication (unofficial) of the European Social Charter in the Official Gazette has not been an obstacle to its quotation and application (even by the Spanish courts), it becomes necessary to warn of this legal-diplomatic error so that it can be corrected and not repeated in future ratifications.

Article 3 - Right to safe and healthy working conditions

Paragraph 2 - Enforcement of safety and health regulations

Occupational accidents and diseases

In its previous Conclusions XX-2 (November 2014), the Committee reserved its position on this point, requesting that the next report provide a full summary table of the data on serious and fatal accidents, in view of the diversity of trends registered during the reference period in relation to the different types of work accidents, and in order better to assess the developments registered during its recent conclusions.

The last report includes the required data and the results are discouraging, as the Spanish Government explicitly says: *“Dans la période d’étude, comprise entre les ans*

2012 et 2015, le taux d'accidents en Espagne a été en augmentant graduellement. Cette tendance accrue a touché surtout le taux d'incidence totale".

The latest statistics on accidents in the workplace in Spain indicate that they increased by 12.3 per cent in 2015 in relation to 2012. In 2015 there were more than 529,000 accidents, including 629 fatalities. The data available for the first six months of 2016 confirm this worrying upward trend.

The increase is not explained solely by rising employment after several years of crisis. An increase in the rate of frequency of accidents can be noted in all the sectors examined, namely industry, construction, agriculture, services and media. This worrying trend represents a step backwards in relation to the regular reduction in workplace accident frequency rates between 2000 and 2012. The rise in accident frequency rates is more substantial among women (15 per cent increase between 2012 and 2015) than among men (8 per cent rise).

Our trade union emphasises that the main cause of this rise in accidents at work is precarity. Precarity at work made possible by government legal reforms (increase in fixed term and part-time contracts) leads to a deterioration in health and working conditions. On one hand, the workload increases; on the other hand, during the crisis companies have prioritised other things and prevention has become a secondary consideration. Fear of losing their job makes workers accept worse working conditions.

Accidents on the way to or from work deserve particular attention. They affect mainly women (almost 57 per cent, although they represent only 45 per cent of the population). The main reasons are that women work part-time more than men, have to combine two jobs and on top of that are responsible for the bulk of domestic and family duties in contrast to men.

These rates are still high, exceeding the average in other EU countries over the period under consideration (2012-2015). For this reason, the CIG concludes that the situation in Spain is not in conformity with Article 3§2 on this point.

Activities of the Labour Inspectorate

In its previous conclusion (XIX-2, 2009), the Committee noted that the report provided no new information on the structure, attributions, staff employed and number of inspections carried out by the Inspectorate departments. It consequently requested that forthcoming reports state whether any changes had occurred in the inspection system during the reference period.

Contrary to the Government's promise to strengthen the workforce of the Labor and Social Security Inspectorate in its fight against fraud with 70 incorporations in 2016, that year closed with only two more inspectors compared to 2015: 813 against 811.

In addition, in 10 autonomous communities the number of inspectors has fallen. For the CIG, these figures show that the Government has not only failed to fulfill its commitment to increase the number of inspectors, but also, if we count the inspectors belonging to the autonomous inspections of Catalonia and the Basque Country, are declining, five: from 948 in 2015 to 943 at present.

The Government promised that it would increase the number of inspectors and sub-inspectors to reinforce "the fight against irregular employment and social security fraud and to act in the prevention of occupational risks". Specifically, he said he would incorporate 22 new entrants to develop inspectorates in 2015, 70 in 2016 and 85 in 2017. However, these promises have been forgotten: the

Government is not meeting the replenishment rate and the staff is increasingly aged and overworked. Spain is far from the ratios of other European countries, with one inspector per 15,000 employees, while in the European Union there is one inspector per 7,300 workers.

It is absolutely necessary to increase the number of employees and to reach the European average, in order to allow the Inspectorate to carry out its legal duties, with special attention to safety and health at work, in a context of increased accidents at work, and compliance with collective agreements.

From our commitment to the defense and protection of health at work, we claim a focus on the subject in which prevention against repair priority. For this reason, we see with concern the increase in accident rate, reflection and result of precariousness and deterioration of working conditions.

However, preventive policies, far from pursuing exclusively the reduction of occupational accidents, we believe that they must adopt a more ambitious perspective, also aimed at improving the regulations on occupational diseases, updating a list today surpassed by the advance of science and which keeps hidden or sub-registered many pathologies with a clear labor etiology.

From the point of view of the preventive organization, we consider that the outsourcing of management and excessive bureaucratization have led to an ineffective experience and misinterpretation of the objectives set forth in the 1995 Prevention Act.

For this reason, the CIG concludes that the situation in Spain is not in conformity with Article 3§2 on this point.

Article 11 - Right to protection of health

Right of access to health care

In its previous Conclusions XX-2 (November 2014), the Committee recalled that the right of access to health care also requires that the arrangements for access to care must not lead to unnecessary delays in its provision. The report states that Royal Decree 1039/2011 of 15 July lays down the framework criteria for ensuring a maximum waiting period for access to health services under the National Health System. The Committee takes note of this legislative basis but asks for specific data on average waiting times for hospital treatment and for initial primary care consultations so as to show that access to health care is possible within reasonable timeframes. In addition, the report supplements the description of the general legal framework and the reforms to it with a specific reference to Royal Legislative Decree 16/2012 of 20 April on urgent measures to guarantee a sustainable national health system and improve the quality and security of care and Royal Decree 1192/2012 of 3 August, which regulates the status of insured persons and beneficiaries for publicly funded health care in Spain through the national health system.

On the other hand, the Committee noted an amendment in Article 1 of the said Royal Legislative Decree 16/2012 (which the report states is supplemented by Royal Decree 1192/2012), which has the effect of denying foreigners irregularly present in the country access to health care except in “special situations” (emergency resulting from serious illness or accident; care for pregnant women, both prenatal and postnatal; foreign minors aged under 18 years) From this point of view, the Committee considered that this denial of access to health care for adult foreigners (aged over 18 years) present in the country irregularly is contrary to Article 11 of the Charter. The Committee has already held that the States Parties

to the Charter (both the 1961 version and the revised 1996 version) “have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties – in particular the European Convention on Human Rights – or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations” (Conclusions 2004, Statement of interpretation of Article 11, p. 10). The Committee has held here that the States Parties to the Charter have positive obligations in terms of access to health care for migrants, “whatever their residence status” (*Médecins du Monde – International v. France*, Complaint No. 67/2011, decision on the merits of 11 September 2012, §144). With specific regard to Article 11, the Committee has pointed out that “paragraph 1 requires States Parties to take appropriate measures to remove the causes of ill-health and that, as interpreted by the Committee, this means, inter alia, that States must ensure that all individuals have the right of access to health care and that the health system must be accessible to the entire population”, insofar as “health care is a prerequisite for the preservation of human dignity and that human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or the European Convention on Human Rights” (*International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 31; *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, decision on the merits of 23 October 2012, §§ 100-101). This idea of universal accessibility has also been underlined as one of the essential elements of the right to protection of health by the United Nations Committee on Economic, Social and Cultural Rights.

As it was already noted in the previous Conclusions, these regressive legislative developments concerning access to health care by foreigners irregularly present in

the country were adopted outside the reference period (2008-2011) and the Committee was unable to take them into account. However, such legislation is maintained in the current cycle and nothing shows that the situation is in conformity with the Charter.

As a matter of fact, the situation of non-compliance (and therefore of non-conformity) anticipated in its conclusions by the Committee has not changed and has also been aggravated in the period under review now. And this is because of the [judgment of the Spanish Constitutional Court \("Tribunal Constitucional"\) number 139/2016, dated July 21](#), which validated the bulk of the constitutionality of the Royal Decree-Law 16/2012, in addition -and this is a really serious concern- of stating that it is in conformity with the European Social Charter. In fact, the Spanish Constitutional Court assumes in this judgment a condition that is not legally binding, such as to act as the interpreter of the European Social Charter, obviating that the only valid interpretation of this Charter is the one made by the European Committee of Social Rights.

There is an obvious contradiction between the Constitutional Court and the European Committee of Social Rights on the conformity of Royal Decree-Law 16/2012 with the European Social Charter on health care for irregular immigrants in the Spanish State.

In spite of what the Committee has stated in a clear and unequivocal way, the Spanish Constitutional Court has made its own legal arguments in this judgment. It analyzes the Royal Decree-Law 16/2012 with the European Social Charter, but not in accordance with the analysis made by the interpreter of the Charter itself. In fact, it analyzes the aforementioned Royal Decree-law not in accordance with its Article 11, but with its Article 13, and concludes that this Article validates the content of the Royal Decree-Law in question, in relation to the right to health care

for irregular migrants. That is, the Spanish Constitutional Court limits itself to make a partially systematic and literal interpretation of the Charter, disregarding what the European Committee of Social Rights had previously disavowed by declaring, as the only valid interpreter in this respect, that the European Social Charter recognizes rights *“without distinguishing between persons referred to explicitly in the Appendix and other non-nationals”*.

For this reason, the CIG concludes that the situation in Spain is not in conformity with this Article on this point

Article 12 - Right to social security

Paragraph 1 - Existence of a social security system

In 2015, 50% of the Eurostat median equivalised annual income stood at € 8 063,5 euros.

In its previous conclusions XVII-2, XV-2 and XX-2, the Committee noted that it fell below 50% of the median equivalised income and asked whether additional benefits were paid to a person earning the minimum level of sickness benefit. The situation is identical in the current cycle, since the IPREM was € 6 390,13 in 2015.

As regards unemployment benefit, in its previous conclusion the Committee held that the level of this benefit was inadequate. The minimum level of benefit is set at 107% of the IPREM (public income indicator used as a reference amount for calculation of benefits) for the unemployed with dependent children and 80% of the IPREM for single unemployed persons. The situation is identical in the current cycle.

The same conclusion must be taken regarding sickness benefit and unemployment benefit, since the IPREM is still the basis used to calculate the minimum levels of benefits and any additional payment, made to persons receiving the minimum level of unemployment benefit.

Therefore, the CIG concludes that the situation in Spain is not in conformity with Article 12§1 of the Charter.

Article 12 - Right to social security

Paragraph 4 - Social security of persons moving between States

Right to equal treatment

in any event, under the Charter, EU States are required to secure, to the nationals of other States Parties to the 1961 Charter and to the Charter not members of the EU, equal treatment with respect to social security rights provided they are lawfully resident in their territory (Conclusions XVIII-1). In order to do so, they have either to conclude bilateral agreements with them or take unilateral measures. The situation is the same in the current period:

- During the reference period, no new bilateral agreements were concluded with Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, "the former Yugoslav Republic of Macedonia", Georgia, the Republic of Moldova and Turkey. Equal treatment with regard to the right to social security is not guaranteed to the nationals of all other States Parties with which there is no bilateral agreement.

- Under Article 12§4, any child resident in a country is entitled to these benefits on the same basis as the citizens of the country concerned. During the reference period, no new bilateral agreements were concluded with Albania, Armenia, Georgia, Serbia, Russian Federation and Turkey. The situation is not in conformity on the ground that equal treatment with regard to access to family allowances in respect of nationals of all other States Parties is not guaranteed.
- In its previous Conclusions XX-2 (November 2014), the Committee referred to its previous conclusion where it found that the ten-year residence requirement to benefit from old-age pensions was excessive. As the Spanish Government acknowledges in its last report, this requirement is currently maintained.

Therefore, the situation remains not in conformity with Article 12§4 of on the grounds that:

- equal treatment with regard to social security rights is not guaranteed to nationals of all other States Parties;
- equal treatment with regard to access to family allowances is not guaranteed to nationals of all other States Parties;
- the length of residence requirement (ten years) for entitlement to non-contributory oldage pensions is excessive.

Article 13 - Right to social and medical assistance

Paragraph 1 - Adequate assistance for every person in need

In its previous Conclusions XX-2 (November 2014), the Committee concluded that the situation in Spain is not in conformity with Article 13§1 of the Charter on the following grounds and it has not changed during the current period:

- Minimum income eligibility is subject to a length of residence requirement: the government recognizes that this requirement is still present in all the Autonomous Communities, and that most of them establish it in 12 months of residence.
- Minimum income eligibility is subject to age requirements (25 years old). The government admits that the majority of the Autonomous Communities, 15 in total (Andalusia, Asturias, Balearic Islands, Castile-La Mancha, Castilla y León, Catalonia, Ceuta, Galicia, Madrid, Melilla, Murcia, Navarra, La Rioja and Comunidad Valenciana), set the minimum age in 25 years.
- Minimum income is not paid for as long as the need persists. The government admits most of the Autonomous Communities establish limits to the duration of the benefit: generally, 12 months.
- The level of social assistance paid to a single person is manifestly inadequate (except for the Basque country and Navarra). The government has not justified any changes during the current period.

Article 14 - The right to benefit from social services

Paragraph 2 - Public participation in the establishment and maintenance of social services

In its previous Conclusions XX-2 (November 2014), the Committee concluded that the situation in Spain is not in conformity with Article 14§2 of the 1961 Charter on the grounds that it has not been established that:

- there are means of monitoring the actions of non-governmental organisations and other non-public service providers;
- there is equal and effective access to social services provided by non-governmental organisations and other non-public service providers.

Given the lack of information in the current report, the CIG understands that the situation is not in conformity on the ground that it has not been established that there are means of monitoring the actions of non-governmental organisations and other non-public service providers.

We notice the same lack of information about the question on the guarantees on effective and equal access to social services provided by non-state providers was guaranteed. In the absence of any reply to this question, the CIG concludes that the situation is not in conformity on the ground that it has not been established that there is equal and effective access to social services provided by non-state providers (i.e. non-governmental organisations and other non-public service providers); particularly on the grounds of gender, race, ethnic origin, religion, disability, age, sexual orientation or political opinion.

Article 4 of the 1988 Additional Protocol - Right of the elderly to social protection

In its previous Conclusions XX-2 (November 2013), the Committee concluded that the situation in Spain is not in conformity with Article 4 of the Additional Protocol of the 1961 Charter on the ground that it has not been established that there is legislation protecting elderly persons from discrimination on grounds of age.

We cannot remain indifferent to the current demographic trend that has been pointed out by the National Statistical Institute in October 2016, about its population projections 2016-2066. They indicate that in the Spanish State the percentage of the population aged 65 and over, which currently stands at 18.7% (that is, 8,701,380 people), would reach 25.6% in the year 2031 (20,725,208 people) and 34.6% in the year 2066 (that is, 14,193,394 people), which in the case of the centennial population (those who are one hundred years old or more) would current 16,460 people to 40,737 in the year 2031 and 222,104 in the year 2066.

In spite of these demographic trends, the Spanish State still does not comply with Article 4 of the Protocol, which requires States to adopt a new and progressive conception of what the life of the elderly should be and to act accordingly with coherent actions involving long-term care. This is not surprising, given that the European Committee on Social Rights has demanded from the Spanish State more information on what it did in relation to the social protection of the elderly in Spain, as insufficient in its reports: Conclusions XVI-2 of 30 June 2004 (reference period 1 January 1997 to 31 December 2000) and in Conclusions XVII-2 of 30 June 2005 (the reference period of 1 January 1999 at 31 December 2002). It should also be taken into account that the European Committee of Social Rights has informed the Spanish State in its Conclusions XIX-2 of 2 January 2010 (the reference period from 1 January 2005 to 31 December 2007) that its situation was not in accordance with Article 4 of the Additional Protocol because - among other things - it has not demonstrated that its health programs cover the needs of the elderly. And if we take into account, lastly, that in its Conclusions XX-2 of 6 December 2013 (the

reference period from 1 January 2008 to 31 December 2011) that its situation was not in accordance with because there is no specific legislation to protect older people against discrimination on the grounds of age, as well as to indicate that their report does not contain any information on the health care provided to the elderly.

In contrast to other States-Members such as France (which has been concerned with adopting specific and anti-discrimination measures to protect elderly persons, such as Act No. 2015-1776 of 28 December on adapting society to aging), the Spanish State still has not approved a specific law for the protection of the elderly.

It cannot be overlooked that the Act 39/2006 of 14 December, on the promotion of personal autonomy and care for dependents, has not served to meet the long-term care (or assistance) needs of our elderly people. And not only because of the fact that its benefits were gradually implemented, but also because its fulfilment has been suspended *sine die* for the requirement of meeting the public deficit targets. This does not quite fit in with the European Committee of Social Rights itself, which insists that the economic crisis can not serve as a pretext for a restriction or refusal that affects the true substance of rights of care or assistance.

Finally, the CIG states that the Spanish Government has not given an adequate answer to the questions asked by the Committee:

- The level of the as well as information on all additional benefits/ allowances a beneficiary would be entitled to. However, the non contributory pension in 2015 was a minimum of € 91,73 and a maximum of € 366,90 distributed in 14 monthly payments per year; these figures do not guarantee adequate resources for a decent life.

- The existence of elder abuse, in the terms of the Toronto Declaration on the Global Prevention of Elder Abuse (2002). The Spanish Government has not provided information to the extent of the problem, to raise awareness on the need to eradicate elder abuse and neglect, and if any legislative or other measures have been taken or are envisaged in this area.

Santiago de Compostela, 28 September 2017.