

THE RIGHT TO DIGNITY AT WORK: REFLECTIONS ON ARTICLE 26 OF THE REVISED EUROPEAN SOCIAL CHARTER

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I. INTRODUCTION

Discourse on the dignity of the worker has grown increasingly with evaluating the impact of technological development on the employment relationship. The 1980s and 1990s marked the beginning of a new era in the protection of workers' rights. Nowadays there is a broad spectrum of thought on workers' dignity in the legal literature.

The concept of dignity constitutes one of the fundamental ideas of the human rights regime in international law and plays an important role in ensuring a standard for the protection of civil and political rights and social and economic rights in Europe. The European Social Charter of 1961 (the Charter) and the Revised European Social Charter of 1996 (the Revised Charter) embody the social and economic rights of particular relevance to the protection of the rights of workers under the aegis of the Council of Europe.¹

The purpose of this article is to describe the emergence of the right to dignity at work in the Revised Charter and to demonstrate its essence in light of the case law of the European Committee of Social Rights (the Committee). We seek to expound the special characteristic of the guarantee of the dignity of workers.

In Section II our study explores the ideas in contemporary legal scholarship dedicated to conceptualizing dignity at work. We focus on concepts of workers' dignity in international labor law and on sociological views to discover the core of the protection of dignity.

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1. The drafters' intent was for the Charter to "form a pendant to the Convention on Human Rights and Fundamental Freedoms." Consultative Assembly of the Council of Europe, Strasbourg, Sept. 18, 1953, Doc. 188, *in* 1 COLLECTED "TRAVAUX PRÉPARATOIRES" 13 (1975) [hereinafter TRAVAUX PRÉPARATOIRES]; DAVID HARRIS & JOHN DARCY, THE EUROPEAN SOCIAL CHARTER 4 (2001).

Section III recounts the history of the discourse on dignity in the composition of the Charter and the Revised Charter. Section IV outlines the nature and content of the right to dignity under Article 26 of the Revised Charter. We give an account of the ambiguity of this right in view of the obligations of the Contracting Parties. Sections V and VI give an overview of the topics embraced by Article 26 of the Revised Charter. In Section VII we assess the impact of Article 26 on the development of the protection of workers' immaterial interests in Europe.

II. CONCEPTS ON THE DIGNITY OF THE WORKER

The protection of the dignity of workers in international labor law is still in development. Many steps have been taken to improve this subject. Efforts to analyze dignity at work include a range of approaches. Furthermore, we present some legal and sociological arguments in this field which could be helpful in explaining the meaning of Article 26 of the Revised Charter.

A. *The Characteristic of the Protection of Dignity in International Labor Law*

1. Inherent Rights relating to the Dignity of the Worker

The classification of the right to dignity of the worker is controversial.² It has not explicitly been anchored in international labor law provisions. However, there are several rights in international human rights law that appear to be closely connected with the dignity.

2. Elaine Pagels, *The Roots and Origins of Human Rights*, in HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS 7 (Alice H. Henkin ed., 1979); DAVID FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES 125 (2d ed. 2002); Rolf Künemann, *A Coherent Approach to Human Rights*, 17 HUMAN RIGHTS Q. 326 (1995); Scott Craig, *Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'*, 21 HUMAN RIGHTS Q. 634 (1999); PAUL TIEDEMANN, WAS IST MENSCHENWÜRDE? 186 (2006); Ruth Ben-Israel, *The Rise, Fall and Resurrection of Social Dignity*, in LABOUR LAW, HUMAN RIGHTS AND SOCIAL JUSTICE (LIBER AMICORUM IN HONOUR OF RUTH BEN-ISRAEL) 5 (Roger Blanpain ed., 2001); Fernando Valdés Dal-Ré, *Fundamental Rights of the Worker*, in National Report to the XVII World Congress of Labour Law and Social Security Montevideo, Uruguay Sept. 3-5, 2003, 37; José Fransisco Siqueira Neto, *Labor Law and the Fundamental Rights of the Person*, in National Report to the XVII World Congress of Labour Law and Social Security Montevideo, Uruguay Sept. 3-5, 2003, 155; Amartya Sen, *Work and Rights*, 139 INT'L LAB. REV. 123 (2000); Philip Alston, *Labor Rights as Human Rights: The Not So Happy State of the Art*, in LABOUR RIGHTS AS HUMAN RIGHTS 23 (Philip Alston ed., 2005); Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 26, 42 (Lance A. Compa & Stephen F. Diamond eds., 2003).

Many authors put forth the argument that Article 23 of the Universal Declaration of Human Rights embodies the nucleus of the right to dignity of the worker at the international level.³ The right to work, the right to equal pay for equal work, the right to just and favorable remuneration, and freedom of association are identified as manifesting the requirements of the dignity of workers. In particular, dignified labor connotes a bundle of “just and favourable conditions of work,” which ensures “an existence worthy of human being” for the worker and his family.

The protection of dignity of the worker as a value was identified in the Philadelphia Declaration.⁴ It was expressly declared regarding the material and immaterial dimensions of work.⁵ The right of human beings “to pursue both their material well-being and their spiritual development in conditions of freedom and dignity” has been reaffirmed in several conventions, recommendations, codes of practice, and the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.⁶

Recognition of the dignity of the worker stems from the discourse on workers’ social dignity. It comprises such elements as the development of personal skills in the employment context, perpetuation of self-worth, financial security, and formation of working conditions.⁷

In its broadest sense, “working with dignity” embraces guaranteeing “inherent” human rights at work.⁸ International labor

3. Ben-Israel, *supra* note 2, at 2; Gideon Ben-Israel & Ruth Ben-Israel, *Senior Citizens: Social Dignity, Status and the Right to Representative Freedom of Organization*, 141 INT’L LAB. REV. 253, 255 (2002); Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 111, 118 (David Kretzmer & Eckart Klein ed., 2002); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 32 (2003).

4. NICOLAS VALTICOS, TRAITÉ DE DROIT DU TRAVAIL 85 (1970); Int’l Labour Org. (ILO) Constitution, Declaration Concerning the Aims and Purposes of the International Labour Organization, arts. I(a), II(a), May 10, 1944, 49 Stat. 2712, 15 U.N.T.S. 35 (Annex to ILO Constitution).

5. *Id.*, art. II(a).

6. The full achievement of “human potential” of persons has been stressed in the Preamble to the ILO Declaration of Fundamental Principles and Rights at Work.

7. Ruth Ben-Israel, *Cultural and Economic Perspectives concerning Protection of Workers’ Social Dignity*, in LABOUR LAW, HUMAN RIGHTS AND SOCIAL JUSTICE: LIBER AMICORUM IN HONOUR OF RUTH BEN-ISRAEL 9 (Roger Blanpain ed., 2001) (citing the work of Alvin L. Goldman); Ben-Israel, *supra* note 2.

8. RANDY HODSON, DIGNITY AT WORK 4 (2001); DONNELLY, *supra* note 3, at 32. On the view that protection against abusive treatment in the workplace should be on the list of core labor standards, see Philip Alston, “Core Labour Standards” and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 486 (2004).

rights can be assessed differently.⁹ There is some doubt concerning the extent to which labor standards are adequate for attaining dignity at work.¹⁰

Freedom from forced labor, freedom of association for trade union purposes, and freedom from discrimination in respect of employment are the major subjects that are enhancing the protection of the civil and political rights at work.¹¹ In the protection of dignity the employer is to set minimum labor standards pertaining to wages, working hours, safety and health, child labor, family leave, and advance notice.¹² Human dignity is a basis for the firm establishment of standards of equity in the employment relationship.¹³

We assert that international labor standards support the protection of dignity of the worker differently. A hierarchy of these rights cannot be set out. There is no unified view on the list of rights that gives voice to the protection of dignity at work.

2. Rights Enhancing Dignity in the Revised Charter

In comparison to international labor standards, the Revised Charter protects several facets of dignity. There are many rights that tend to ensure the worth and autonomy of the worker.

Apart from Article 26, the Revised Charter covers several areas concerning the protection of dignity. Respect of dignity is identified with reference to the right to housing and the right to protection against poverty and social exclusion.¹⁴ With regard to social

9. C. WILFRIED JENKS, HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS 127 (1960); INT'L LAB. ORG., SOCIAL POLICY IN A CHANGING WORLD 16 (1976); Breen Creighton, *The Future of Labour Law: Is There a Role for International Labour Standards?*, in THE FUTURE OF LABOUR LAW LIBER AMICORUM BOB HEPPLE QC 253, 267-69 (Catherine Barnard & Simon Deakin & Gillian S Morris eds., 2004); Paul O'Higgins, *The Interaction of the ILO, the Council of Europe and European Union Labour Standards*, in SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 55, 68-69 (Bob Hepple ed., 2002); Werner Sengenberger, *International Labour Standards in the Globalized Economy: Obstacles and Opportunities for Achieving Progress*, in GLOBALIZATION AND THE FUTURE OF LABOUR LAW 331, 331-33, 337-39 (John D.R. Craig & Michael Lynk eds., 2006); CHRISTINE KAUFMANN, GLOBALIZATION AND LABOUR RIGHTS 28-86 (2007).

10. Alston, *supra* note 8, at 483.

11. JENKS, *supra* note 9, at 9; Nicolas Valticos, *International Labour Standards and Human Rights: Approaching the Year 2000*, 137 INT'L LAB. REV. 139 (1998).

12. JOHN W. BUDD, EMPLOYMENT WITH A HUMAN FACE, BALANCING EFFICIENCY; EQUITY AND VOICE 19, 28-30 (2004).

13. *Id.* at 23.

14. Eur. Soc. Charter (Revised), Eur. Comm. Soc. Rights Conclusions 2003, art. 31, at 228-29 (Fr.) [hereinafter Conclusions]; 1 Conclusions 2003, at 346 (It.); 2 Conclusions 2003, at 558 (Slovn.); 2 Conclusions 2003, at 654 (Swed.); *see also* 2 Conclusions 2005, at 408-10 (Lith.); 1 Conclusions 2003, at 214 (Fr.) (citing article 30: "living in a situation of poverty and social exclusion violates the dignity of human beings"); 1 Conclusions 2003, at 335 (It.); 2 Conclusions 2003, at 548 (Slovn.); 2 Conclusions 2003, at 644 (Swed.).

protection, “the right to personal dignity” and “respect of human dignity” are emphasized repeatedly.¹⁵

The right to work is aimed at securing the freedom of workers.¹⁶ The right to work, the right to just conditions of work and the right to safe and healthy working conditions have been considered “the first three fundamental rights of the Social Charter” fundamental to the enhancement of dignity at work.¹⁷

Several provisions of the Charter guarantee the protection of the worker’s private and family life.¹⁸ The immaterial interests of workers are respected by the regulation of health, safety, and working time.¹⁹ The right to a safe and healthy working environment “is one of the fundamental principles of human rights “as establishing a widely recognised principle, stemming directly from the right to personal integrity.”²⁰ The quality of life of the worker is protected under Article 3 of the Revised Charter.²¹

The right to fair remuneration is “the essential corollary of . . . the right to work, the right to just conditions of work and the right to safe and healthy working conditions.”²² This right “constitutes one of the basic economic objectives of human activity.”²³ Financial security beyond the security of employment is an important idea in many other rights.²⁴

Respect for dignity requires the prevention of discrimination. Article 20 of the Revised Charter “refers to all rights and situations

15. 1 Conclusions XVI-2, at 372 (Greece); 1 Conclusions 2003, at 316 (It.); 2 Conclusions XVII-2, at 739–40 (Sp.); *see also* Article 24 lit. a of the Revised Charter (the right not to be dismissed without valid grounds) 1 Conclusions 2003, at 80 (Bulg.); 1 Conclusions 2003, at 322 (It.); 2 Conclusions 2003, at 424 (Rom.).

16. Conclusions I, at 15 (General Introduction to Article 1 paragraph 2 of the Charter).

17. Conclusions I, at 25 (General Introduction to Article 4 of the Charter).

18. 1 Conclusions XIV-2, at 32 (General introduction); 1 Conclusions XIV-2, at 365 (Ice.); 1 Conclusions XIV-2, at 115 (Belgium); *see also* 2 Conclusions XIV-2, at 791 (Dissenting opinion of Mrs. Jamouille concerning Art. 2 paragraph 1) (Belg.). There have been no changes in the sixteenth cycle 1 Conclusions XVI-2, at 60 (Belg.). Article 2, paragraph 3 aims to protect “the workers from any abuses which might even occur with his own will or within his own family.” Conclusions IV, at 17 (Ir.).

19. The reduction of physical and mental fatigue is a main subject of the protection of health of the worker that can be achieved by effective regulation of working time. Conclusions V, at 16 (General introduction); Conclusions XIII-1, at 79 (It.); Conclusions XIII 3, at 24 (Add. Lux.); Conclusions XIII-4, at 339 (Belg.); 1 Conclusions 2003, at 30 (Bulg.); 1 Conclusions 2003, at 108–09 (Fr.); 1 Conclusions 2003, at 250 (It.); 2 Conclusions 2003, at 368 (Rom.); 2 Conclusions 2003, at 444 (Slovn.); 1 Conclusions 2005, at 300 (Lith.); 1 Conclusions 2005, at 129 (Est.); 1 Conclusions 2005, at 62 (Cyprus); 1 Conclusions 2003, at 250 (It.); 2 Conclusions XIV-2, at 543 (Neth.).

20. Conclusions I, at 22 (General Introduction).

21. Conclusions VI, at xiii (General Introduction, Protection of the Individual at Work).

22. Conclusions I, at 25 (General Introduction).

23. *Id.*

24. *See, e.g.*, Article 8 of the Charter Conclusions VII, at 54 (Austria).

associated with the specific position of the worker in his or her occupational relations and working environment.”²⁵

Some aspects of the development of personality, for instance career development, are acknowledged indirectly in conjunction with certain rights.²⁶ The right to vocational training implies the promotion of “individual aptitude” in education and through training facilities.

The personal autonomy of the worker and freedom of choice are guaranteed in respect of the right to organize.²⁷ It has been acknowledged that, “any form of compulsion on a worker to belong to a trade union violates the right to freedom of association.”²⁸ A worker can freely decide on whether to join a trade union.²⁹

3. Dignity as a Value in the Interpretation of the Charter

Dignity has a special function in the supervision of the conformity of states' reports with the Charter. The idea of dignity plays a significant role in the implementation of social rights. Human dignity forms an important value in the interpretation of specific human rights.³⁰ For example, the Committee stated that

The very essence of the Social Charter is to guarantee and respect the dignity of all human beings, irrespective of their physical or mental condition. The idea of human rights implies that the dignity of all individuals must be recognised and respected. In this respect the protection of disabled persons in the field of vocational training

25. See Explanatory Report to Additional Protocol of 1988 ad Article 1 No. 22; see also Conclusions XVII-2, at 623–25 (Neth.) (Report concerning Aruba); Conclusions XIII-5, at 274 (Swed.); Conclusions 2002, at 259 (Swed.); 2 Conclusions 2006, Art. 20 (Mold.); 1 Conclusions 2004, at 34 (Bulg.).

26. Conclusions XIII-3, at 432-433 (Fin.); Conclusions XIII-5, at 257 (Swed.); 1 Conclusions 2004, at 294 (Ir.); 1 Conclusions 2002, at 160 (Rom.); Conclusions XVII-2, at 340–41 (Greece).

27. Conclusions II, at 23 (Swed.); Conclusions II, at 184 (Cyprus); Conclusions IV, at 39 (General Introduction); Conclusions VII, at 33 (U.K.); Conclusions XI-1, at 78 (Ice.); Conclusions XIII-1, at 26 (General Introduction).

28. 1 Conclusions XVI-1, at 346 (Ir.).

29. Conclusions XI-1, at 78 (Ice.); Conclusions XIII-1, at 135 (Swed.); 2 Conclusions XVI-1, at 441 (Neth.); Conclusions XII-1, at 111 (Den.); Confederation of Swedish Enterprise v. Sweden, Complaint No. 12/2002, Eur. Comm. Of Social Rights, Comm. Of Experts, 194th Sess., at 7, available at http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/CC12Merits_en.pdf (“The freedom guaranteed by Article 5 of the Charter implies that the exercise of a worker’s right to join a trade union is the result of a choice and that, consequently, it is not to be decided by the worker under the influence of constraints that rule out the exercise of this freedom.”).

30. Rolf Birk, in *LA CHARTE SOCIALE DU XXI^E SIECLE* 34 (Council of Europe, 1997); FELDMAN, *supra* note 2; Paulo César Carbonari, *Human Dignity as a Basic Concept of Ethics and Human Rights*, in *DIGNITY AND HUMAN RIGHTS: THE IMPLEMENTATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 35, 39–41 (Berma Klein Goldewijk et al. eds., 2002).

and employment is a good example of the vital link between the safeguard of social rights and the guarantee of human dignity.³¹

Dignity acts as “an over-arching principle.”³² Article 15 of the Charter has been interpreted on the basis of human dignity. Human dignity has been considered a fundamental principle. Dignity has a different meaning in this context. It serves as a basis for the assessment of the implementation of undertakings under the Charter and the Revised Charter.

Regarding Articles 13 and 17 of the Revised Charter it was acknowledged that, “Human dignity is the fundamental value and indeed the core of positive European human rights law—whether under the European Social Charter or under the European Convention of Human Rights.”³³

The Committee emphasized the role of dignity as recognized in the Preamble of the Vienna Declaration and Programme of Action.³⁴ Dignity appears to be a universal value aiding the interpretation of the social rights included in the Charter.³⁵

B. Sociological Views on the Dignity of the Worker

Sociological research on the dignity of the worker is of vital importance in determining the meaning of dignity. The authors particularly examine the subjective attitude of workers to work, the self-worth of the worker by the worker’s own assessment as well as the assessment of others, and both a subjective and objective appraisal of the impact of work on the worker. They draw comparisons on the relationship between workers’ experiences of work and the effects of those experiences on self-worth.

Dignity at work is appraised from diverse perspectives because the factors influencing the concept of dignity of workers are manifold. We identify some core elements of the sociological assumptions.

31. 1 Conclusions XIV-2, at 63 (General introduction).

32. IAN MASON, THE RIGHTS TO HUMAN DIGNITY AND OTHER LECTURES 7 (2005); Pagels, *supra* note 2 at 7.

33. Int’l Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, Eur. Comm. Of Soc. Rights, Comm. of Experts, 203d Sess., at 10, *available at* http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/R_C14_on_merits.pdf.

34. Vienna Declaration and Programme of Action, World Conference on Human Rights, U.N. Doc. A/CONF. 157/23 (July 12, 1993).

35. On respecting dignity as the aim of interpreting human rights, see BEATRICE MAURER, LE PRINCIPE DE RESPECT DE LA DIGNITE HUMAINE ET LA CONVENTION EUROPEENNE DES DROITS DE L’HOMME 199–259 (1999).

1. Dignity as a Worth of the Worker

The meaning of dignity is interrelated to the concept of work. It is widely accepted that work secures recognition and social dignity.³⁶ Work imparts a dignified existence to the worker.³⁷ In this regard, the absence of work exerts influence on the concept of the dignity of workers.³⁸

There are several facets to “working with dignity” relating to activities that are “worthy of respect by oneself and others.”³⁹ Many authors acknowledge that work is associated with self-reliance, self-respect, and a basis for well-being.⁴⁰ In the broadest sense, dignity has been defined as sense of self-worth.⁴¹

2. Dignity as Autonomy of the Worker

Respect for dignity includes the need to protect freedom and autonomy and can be seen as an objective of the employment relationship.⁴² The autonomy of the worker is of particular significance in the employment relationship.⁴³ In respect thereof, the quality of the performance of work or the completion of work tasks is decisive in determining the essence of dignity.⁴⁴

Dignity has been categorized with regard to the behavior of workers under certain working conditions. It has been described as

36. Robert Castel, *Work and Usefulness to the World*, 135 INT'L LAB. REV. 615, 618–21 (1996).

37. G.M. Kelly, *Employment and Concepts of Work in the New Global Economy*, 139 INT'L LAB. REV. 5, 9 (2000); Melvin L. Kohn, *Unresolved Issues in the Relationship between Work and Personality*, in *THE NATURE OF WORK SOCIOLOGICAL PERSPECTIVES 37* (Kai Erikson & Steven Peter Vallas ed., 1990).

38. MARGALIT AVISHAI, *POLITIK DER WÜRDE* 285–292 (1997); NEGT OSKAR, *ARBEIT UND MENSCHLICHE WÜRDE* 10-11 (2001).

39. HODSON, *supra* note 8, at 4; Gayatri Naraine, *Dignity, Self-Realization and the Spirit of Service: Principles and Practices of Decent Work*, in *PHILOSOPHICAL AND SPIRITUAL PERSPECTIVES ON DECENT WORK 96* (Dominique Peccoud ed., 2004).

40. CHAN CHAN KWAN, *HUMAN DIGNITY AND WELFARE SYSTEMS* 6 (2005); JEREMY RIFKIN, *THE END OF WORK* 187 (2000); E. Kevin Kelloway, Daniel G. Gallagher & Julian Barling, *Work, Employment, and the Individual*, in *THEORETICAL PERSPECTIVES ON WORK AND THE EMPLOYMENT RELATIONSHIP* 105, 113 (Bruce E. Kaufman ed., 2004); CATHERINE CASEY, *WORK, SELF AND SOCIETY AFTER INDUSTRIALISM* 86 (1995).

41. MICHELE LAMONT, *THE DIGNITY OF WORKING MEN: MORALITY AND THE BOUNDARIES OF RACE, CLASS, AND IMMIGRATION* 19, 24, 51 (2000); FELDMAN, *supra* note 2, at 127.

42. Dignity requires “the right to make one’s own decisions.” FELDMAN, *supra* note 2, at 126; KWAN, *supra* note 40, at 22; BUDD, *supra* note 12, at 7, 13, 19.

43. On the interpretation of the autonomy of workers, see Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 75 UMKC L. REV. 52–55 (2007); AVISHAI, *supra* note 38, at 287.

44. Tim Strangelman, *Dignity, Respect and the Cultures of Work*, 20 WORK, EMP. & SOC’Y 182 (2006).

resistance to abuse, overwork, or exploitation; a sense of pride in one's work; pursuit of personal meaning outside the institutionally scripted flow of organizational activity; and development of social aspects of work life.⁴⁵ These four areas of safeguarding dignity are aimed at counteracting the denials of dignity such as mismanagement, overwork, restraint of autonomy, and of employment involvement.⁴⁶

Dignity at work can be conceived of as including such topics as economic security, fair treatment by the employer, and intrinsically satisfying work.⁴⁷ Reflecting on the determinants of dignity at work, it is argued that the higher pay, adequate levels of staffing and resources, and access to training can significantly influence a worker's concept of dignity.⁴⁸ These factors enhance the autonomy of workers.⁴⁹

3. Diversity of Arguments

We can recognize that no consensus has been reached on the patterns of dignity at work. The literature exhibits a variety of findings and the authors hold different views.

The studies give evidence that the worth of the worker remains the primary constituent element as regards the discourse on dignity at work. In our view the common sense notion of dignity provides a basis for the interpretation of the dignity of a worker. However, the subject of workers' dignity is a special concern; as to the characteristics of work, dignity has a particular meaning. Working with dignity is determined by the conditions of the performance of work. As a result of the complexity of these conditions, the meaning of dignity at work could only be identified with difficulty.

C. Divergences of the Legal and Sociological Approaches on the Dignity of Workers

The concept of "dignity" is a wide one and gives rise to interpretive difficulties in the legal as well as the sociological context. The meaning of dignity differs depending on the contextual dimensions.⁵⁰

45. HODSON, *supra* note 8, at 17, 42, 49.

46. *Id.* at 17, 264.

47. Peter Berg & Ann C. Frost, *Dignity at Work for Low Wage, Low Skill Service Workers*, 60 *INDUS. REL.* 658-60 (2005).

48. *Id.* at 666, 673, 677-78.

49. *See* KWAN, *supra* note 40, at 29.

50. Alan Gewirth, *Human Dignity as the Basis of Rights*, in *THE CONSTITUTION OF RIGHTS HUMAN DIGNITY AND AMERICAN VALUES* 11 (Michael J. Meyer, William A. Parent ed., 1992);

The term "dignity" as it used in the legal and sociological approach tends to refer to dignity in its etymological sense. It is generally recognized that dignity can mean "the quality or state of being worthy; intrinsic worth; excellence" or "the quality or state of being honored or esteemed; degree of esteem; honor" or "behavior that accords with self-respect."⁵¹ The interpretation of dignity at work is rooted in these notions.

The legal and the sociological perspectives on the dignity of the worker differ. But they are also complementary.

Deliberations on the dignity of the worker in the legal context are heterogeneous. The value of dignity is inherent to social rights and classic freedoms.⁵² The meaning of dignity can be expounded in respect of the philosophical and ethical origin of the subject.⁵³

Sociological views contemplate a subjective approach of workers' dignity. In the legal approach this aspect is not on the scale of the analysis. The aspects of dignity clarified in the sociological literature overlap with the content of some of the rights enshrined in the international human rights of workers such as provisions on working time, just conditions of work, fair remuneration, and respect for private life.

The institutional foundation of the protection of workers' rights is an important factor in the interpretation of dignity. The ideological mission of the international organization in question will influence its position. The International Labour Organization and the European Council have different focuses in this regard.

1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 632 (1968); 2 PAUL-EMILE LITTRÉ DICTIONNAIRE DE LA LANGUE FRANÇAISE [DICTIONARY OF THE FRENCH LANGUAGE] 1729 (1959); BLACK'S LAW DICTIONARY 456 (6th ed. 1990); 1 JOWITT'S DICTIONARY OF ENGLISH LAW 613 (Earl Jowitt, Clifford Walsh & John Burke 1977); 2 STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES 712 (John S. James ed., 5. ed. 1986).

51. I WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 632 (1968); Meir Dan-Cohen, *Defending Dignity*, in HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 150, 161 (2002); MASON, *supra* note 32, at 14.

52. Tadeusz Jasudowicz, *The Legal Character of Social Rights from the Perspective of International Law as a Whole*, in SOCIAL RIGHTS AS HUMAN RIGHTS: A EUROPEAN CHALLENGE 25 (Krzysztof Drzewicki, Catarina Krause & Allan Rosas eds., 1994); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973 (1964); JOHN D.R. CRAIG, PRIVACY AND EMPLOYMENT LAW 18-20 (1999).

53. The extra-legal concepts of dignity make it difficult to unify the "transnational legal use of dignity." See Christopher McCrudden, *Human Dignity* 45 (Oxford Legal Studies Research Paper Series, Working Paper No 10, 2006), available at <http://papers.ssrn.com/Abstract=899687>.

III. FROM AN IDEA TO THE RIGHT TO DIGNITY

A. “*Respect for the Dignity of Man*” and the *European Social Charter*

During the drafting of the Charter attention was paid to the term “dignity” in several contexts. In the early documents of the “travaux préparatoires,” dignity was anchored as a basic principle of progressive social development in Europe.

Dignity in the social field was specified as being among the common principles and “spiritual values underlying western civilization.”⁵⁴ “Respect for the dignity of man” was specified as an aim of European social policy. This concept was illustrated with regard to the improvement of living conditions:

In harmony with Article 1 of the Statute of the Council of Europe, the member Governments should declare that European Society is based on the respect for the dignity of man and has its aim the improvement of his living conditions. The aim of the social policy of the member Governments should therefore be the continuous improvement of the standard of living of all members of society to the greatest extent possible in the light of economic conditions, and the fair distribution of available resources as well as the equal sharing of burdens.⁵⁵

Further, the “moral wellbeing” and the “fullest development of the individual” were emphasized as important criteria of European social policy:

Notwithstanding the importance of purely economic factors, an adequate standard of living means not only physical but also moral wellbeing; accordingly the Governments should declare that social policy should be related to the spiritual and moral values which are the common heritage of the peoples of Europe and which are referred to in the Preamble to the Statute. European social policy should therefore aim at maintaining a social environment which is conducive to the fullest development of the individual.⁵⁶

These quotations show that the principles relating to dignity were formulated idealistically. They covered universal values laid down in a social policy addressed to governments and concerned the adoption of guidelines for the codification of social and economic rights and for the future activities of the Council of Europe.

54. Memorandum of the Secretariat-General of the Council of Europe on the Role of the Council of Europe in the Social Field SG (53) 1 Strasbourg, 16th April 1953, in 1 TRAVAUX PRÉPARATOIRES, *supra* note 1, at 4.

55. Memorandum of the Secretariat-General of the Council of Europe on the Role of the Council of Europe in the Social Field, SG (53) 1 Strasbourg, 16th April 1953, in 1 TRAVAUX PRÉPARATOIRES, *supra* note 1, at 5.

56. *Id.* at 5.

In preparing the draft report on the Charter there was an endeavor to stress the importance of respect for human dignity.⁵⁷ "Respect for the dignity of man, and the maintenance of a social milieu which is conducive to the fullest development of the individual and the family," were advanced as general principles for a common European social policy.⁵⁸

1. The Idea of the Development of Human Personality

The development of "human personality" was considered an aspect of human dignity and has been addressed from different perspectives.⁵⁹ On the one hand the focus was on the free development of one's own personality. It was stated, "The supreme aim of their social policy will be to develop the human personality and to allow the individual the opportunity of exercising his natural gifts to the full with due regard for his duty to other individuals and to the community in which he lives."⁶⁰ On the other hand, the participation of workers in management was identified with regard to the development of human personality:

work is not an end in itself. The High Contracting Parties recognise it as essential for the development of the human personality that workers should have a share in the fruits of their labours, particularly by participation in the management and in the profits of the undertaking by which they are employed.⁶¹

This principle was implemented as a separate article of the draft Charter.⁶² The right to development of human personality was not

57. Consultative Assembly of the Council of Europe, Official Report Twenty-first Sitting, Common Policy of Member States in Social Matters (Debate on the Report of the Committee on Social Questions, Doc. 188), *in* 1 TRAVAUX PRÉPARATOIRES, *supra* note 1, at 20.

58. Committee on Social Questions of Consultative Assembly, Preparation of a European Social Charter AS/Soc (6) 11 Strasbourg, 17th September 1954, 1 TRAVAUX PRÉPARATOIRES, *supra* note 1, at 46, 51, 53.

59. Committee on Social Questions of Consultative Assembly, Strasbourg, 19th April 1955, AS/Soc I (6) 1, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 12.

60. *Id.* at 12; Committee on Social Questions of Consultative Assembly, Strasbourg, 20th May 1955, AS/Soc I (6) 2 Preliminary Draft of Social Charter, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 47; Committee on Social Questions of Consultative Assembly, Strasbourg, 18th June 1955, AS/Soc (6) 28 Preliminary Draft of Social Charter, *in* I TRAVAUX PRÉPARATOIRES, *supra* note 1, at 83; *see id.* at 145.

61. Committee on Social Questions of Consultative Assembly, Strasbourg, 20th May 1955, AS/Soc I (6) 2 Preliminary Draft of Social Charter, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 49. *See* Committee on Social Questions of Consultative Assembly, Strasbourg, 19th April 1955, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 12, 29; Committee on Social Questions of Consultative Assembly, Strasbourg, 18th June 1955, AS/Soc (6) 28 Preliminary Draft of Social Charter, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 84; *see id.* at 146.

62. Committee on Social Questions of Consultative Assembly, Strasbourg, 19th April 1955, AS/Soc I (6) 1, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 14; Committee on Social Questions of Consultative Assembly, Strasbourg, 20th May 1955, AS/Soc I (6) 2 Preliminary

expressly described in the preliminary versions of the Charter.⁶³ Dignity was later construed as a “fundamental aspect of man’s well-being.”⁶⁴

The development of human personality was inserted into draft Article 2 of the Charter.⁶⁵ Human personality was assessed as regards the elements of the declaratory recognition of principles and objectives of social policy relating to the rights specified in Article 2 of the draft Charter.⁶⁶ The declaratory part of the right to fair and stable conditions of work according to the Article 2 of the draft Charter was formulated as follows:

1. The High Contracting Parties recognize that conditions of work should be such as to enable workers to find satisfaction in their work, develop their human personality, protect their health, and provide themselves and their families with an independent and decent livelihood. Within the limits of their constitutional and national procedures, they will take appropriate steps to secure such conditions, particularly through measures designed to secure for all workers fair wages, including a guaranteed minimum wage and a guaranteed weekly wage, reasonable possibilities of promotion and adequate time and facilities for leisure. . . .”⁶⁷

The development of human personality was recognized as one of the aims of the regulation of working conditions. Different obligations were originally adopted in draft Article 2. Emphasis was placed on the protection of the workers’ material existence such as safe and healthy working conditions, protection against arbitrary dismissal, protection of wages, working time, and leisure. These issues were apparently favored over the protection of “morals” at work.⁶⁸

Draft of Social Charter, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 57; Committee on Social Questions of Consultative Assembly, Strasbourg, 18th June 1955, AS/Soc (6) 28 Preliminary Draft of Social Charter, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 87.

63. It was considered as a “right” pertaining to the right to education. “Rights Relating to the Cultural Development of Human Personality” Committee on Social Questions of Consultative Assembly, Strasbourg, 18th June 1955, AS/Soc (6) 28 Preliminary Draft of Social Charter, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 92; Consultative Assembly of Council of Europe, 26th October 1955, Doc. 403, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 148.

64. Consultative Assembly of Council of Europe, 13th October 1955, Official Report, *in* II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 185.

65. Consultative Assembly Committee on Economic Questions, Strasbourg, 28th February 1956, AC/EC (7) 24, *in* III TRAVAUX PRÉPARATOIRES, *supra* note 1, at 70–71.

66. Consultative Assembly Committee on Economic Questions, Strasbourg, 28th February 1956, AC/EC (7) 24, *in* III TRAVAUX PRÉPARATOIRES, *supra* note 1, at 52.

67. Consultative Assembly Committee on Economic Questions, Strasbourg, 28th February 1956, AC/EC (7) 24, *in* III TRAVAUX PRÉPARATOIRES, *supra* note 1, at 70.

68. Social Committee, Strasbourg 4th April, 1957, CE/Soc/WPI (57) 2, *in* IV TRAVAUX PRÉPARATOIRES, *supra* note 1, at 44, 75.

Social wellbeing at work was selected as a central topic in the protection of health.⁶⁹

The advancement of the moral development of workers was considered in conjunction with the right to leisure.⁷⁰ The draft provision on the support of the individual “with proper guidance with regard to the leisure time as well as with ample opportunities for spare time activities conducive to his physical, cultural and moral development” was deleted.⁷¹

2. Achievements at the Final Stage of the Drafting of the Charter

The nature of economic and social rights was heavily discussed during the composition of the Charter.⁷² In question was which obligations could be seen as a right in the strict sense and which could be seen as a declaration of mere principle. Dignity was asserted to be a value rather than a right.⁷³

Proposals on the development of the personality of the worker were rejected. Protection of dignity was not incorporated in the Charter. The responsibilities of the Contracting Parties regarding the protection of moral values at work were not accentuated. The aspects of the protection the dignity of *the worker* were not specified. The draft texts alluded to the dignity of *man*.⁷⁴ The ideas contained in the travaux préparatoires were not espoused in the final version of the Charter. Dignity had assumed a marginal position in the drafting.

Dignity was incorporated in the Preamble of the draft Charter among the principles of social policy.⁷⁵ The passage on the respect of

69. Social Committee, Strasbourg 20th June 1957, CE/Soc (57) 12, in IV TRAVAUX PRÉPARATOIRES, *supra* note 1, at 121.

70. Social Committee, Strasbourg 15th September 1957, CE/Soc (57) 1, in IV TRAVAUX PRÉPARATOIRES, *supra* note 1, at 168–69.

71. Social Committee, Strasbourg, 10th October 1957, CE/Soc (57) 18 Final, in IV TRAVAUX PRÉPARATOIRES, *supra* note 1, at 197; Social Committee, Strasbourg, 9th January 1958, CM (58) 1, in V TRAVAUX PRÉPARATOIRES, *supra* note 1, at 29.

72. Consultative Assembly Committee on Economic Questions, Strasbourg, 28th February 1956, AC/EC (7) 24, in III TRAVAUX PRÉPARATOIRES, *supra* note 1, at 50; Committee of Ministers Report of the Social Committee, Strasbourg, 10th February 1958 CM (58) 18, in V TRAVAUX PRÉPARATOIRES, *supra* note 1, at 49.

73. See AS/Soc (6) 11 Strasbourg, 17th September 1954, in I TRAVAUX PRÉPARATOIRES, *supra* note 1, at 17; Consultative Assembly of the Council of Europe, Official Report Sixteenth Sitting 1955, in II TRAVAUX PRÉPARATOIRES, *supra* note 1, at 185.

74. Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and his Rights*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 1, 5 (David Kretzmer & Eckart Klein eds., 2002).

75. Consultative Assembly Committee on Economic Questions, Strasbourg, February 28, 1956, AC/EC (7) 24, at 65–66 and 89; Consultative Assembly, April 14, 1956, Doc. 488, at 467; Consultative Assembly, October 26, 1956, Recommendation 104 (1956), at 646–647, in III

dignity of man was thereafter struck out of the draft texts.⁷⁶ The wording was changed to “human rights and fundamental freedoms.” In the Preamble to the Charter, the principles were listed sparsely and dignity is not mentioned among them.

B. The Right to Dignity and the Renewal of the European Social Charter

Three decades later the declamatory ideas on dignity blossomed into a precise concept at the revitalization of the Charter. Protection of the dignity of the worker was established as an independent topic. In creating the Revised Charter, several initiatives were taken concerning the protection of the immaterial interests of workers.

1. Proposals on the Protection of Workers' Integrity

At the time of drafting the Revised Charter the “protection of a worker's integrity” was a matter of intense dispute.⁷⁷ Dignity was not mentioned in the draft texts. The working parties concentrated on the “integrity” of the worker. One of the early disputes centered on the subjects of sexual harassment and the misuse of collected data by the employer.⁷⁸ The proposal on the protection of workers against misuse of collected data was rejected in the absence of sufficient “political will” for inserting an autonomous provision in the Charter.⁷⁹

A number of delegates questioned the necessity of including in the Charter a provision on protection against sexual harassment at work.⁸⁰ There was debate over whether such a provision belonged in the Revised Charter at all. The “aptness” of incorporating such an idea was criticized on the basis of the issue's insufficient legal “maturity.”⁸¹ The parties were in doubt about the definition of sexual harassment, enforcement, rights, and duties as well as sanctions.⁸²

TRAVAUX PRÉPARATOIRES, *supra* note 1; Social Committee, Strasbourg 15th September 1957, CE/Soc/WP II (57) 1 Appendix III, in IV TRAVAUX PRÉPARATOIRES, *supra* note 1, at 177.

76. Social Committee, Strasbourg 31st October 1957, CE/Soc (57) 19, in IV TRAVAUX PRÉPARATOIRES, *supra* note 1, at 230–31, 386.

77. CHARTE/REL (93) 10 def., Strasbourg, March 19, 1993, 7th meeting (Strasbourg, January 26–29, 1993) Summary Report, at 30.

78. *Id.* at 30.

79. CHARTE/REL (93) 15 Strasbourg, May 14, 1993 8th meeting (Strasbourg, May 5–7, 1993) Summary Report, at 40; CHARTE/REL (94) 23, Strasbourg, October 19, 1994, Final Activity Report Document prepared by the Directorate of Human Rights, at 24 app. IV.

80. CHARTE/REL (93) 15 Strasbourg, May 14, 1993 8th meeting (Strasbourg, May 5–7, 1993) Summary Report, at 5.

81. *Id.* at 5.

82. *Id.* at 5.

Which concepts should be covered and how they should be understood was questionable.⁸³

The Steering Committee for Equality between Women and Men (CDEG) preferred inclusion of a specific provision in the Charter on "protection against sexual harassment as a violation of the dignity of the human person."⁸⁴ It was suggested that a provision on "protection against sexual harassment as a violation of the dignity of the human person" be placed in a new paragraph in Article 2 of the Charter.⁸⁵

Dignity had been classified in relation to the principle of equality between women and men.⁸⁶ The concept of dignity was treated as closely linked with sexual harassment.⁸⁷ Dignity of the human person was identified without further elaboration of the concept and of terms.

2. Opinions on the Concept of Workers' Integrity

Arguments in the final stage of the drafting process concerning the protection of workers' integrity were controversial. Notwithstanding comments to the contrary, the Committee decided to include an article in the Charter protecting workers from sexual harassment.⁸⁸

The Swedish expert supported the acceptance of a wider concept of protection of dignity at work, namely protecting workers against victimization in any form.⁸⁹ It was agreed that a paragraph on victimization would be included in the Revised Charter.⁹⁰

83. CHARTE/REL (94) 17 Strasbourg, July 8, 1994, 11th meeting Summary Report, at 10-11.

84. CHARTE/REL (92) 9 Strasbourg, March 26, 1992, Opinion of the Steering Committee for Equality between Women and Men (CDEG) on the Improvement of the European Social Charter (1st meeting, February 5-7, 1992) at 2-3.

85. CHARTE/REL (92) 9 Strasbourg, March 26, 1992, Opinion of the Steering Committee for Equality between Women and Men (CDEG) on the Improvement of the European Social Charter (1st meeting, February 5-7, 1992) at 3; CHARTE/REL (92) 11 rev. 2 Strasbourg, September 4, 1992, Improvement of the Substantive Content of the Charter Document prepared by the Directorate of Human Rights, at 19; CHARTE/REL (93) 10 def., Strasbourg, March 19, 1993, 7th meeting (Strasbourg, January 26-29, 1993) Summary Report, at 30; CHARTE/REL (94) 23, Strasbourg, October 19, 1994 Final Activity Report, at 23 app. IV.

86. *See, e.g.*, CHARTE/REL (92) 9 Strasbourg, June 24, 1992 Addendum to the Opinion of the Steering Committee for Equality between Women and Men (CDEG) on the Improvement of the European Social Charter (2nd meeting, June 3-5, 1992); CHARTE/REL (92) 11 rev. 2 Strasbourg, September 4, 1992, Improvement of the Substantive Content of the Charter Document prepared by the Directorate of Human Rights, at 14.

87. CHARTE/REL (93) 19 Strasbourg, August 11, 1993, at 2.

88. *Id.* at 10, 50 app. IX.

89. *Id.* at 10.

90. CHARTE-REL (94) 19, Strasbourg, August 26, 1994, 12th meeting (Strasbourg, October 10-14, 1994), at 2, 4 (Working Document).

3. A Compromise Solution

The final version of the draft contained provisions on sexual harassment and on victimization entitling protection of a worker's integrity. It is unclear how the heading of the draft Article 26 of the Revised Charter came to be renamed as the "right to dignity."

By examining statements made during the drafting of the Revised Charter, we assert that the experts did not intend comprehensively to clarify the concept of dignity. An autonomous concept of dignity was not canvassed. The details on the protection of workers' integrity were not worked out. National legislation and European Community regulations were regarded as the standard for the draft provisions. International human rights sources were not invoked in revising the Charter.

In comparison to the drafting of the Charter, the drafting of the Revised Charter did not involve declamatory ideas on dignity. Rather, practical aspects of this subject were analyzed and the concept of dignity was not charted in its elaborateness. Instead, the extent of the protection was restricted to only two subjects.

IV. PROTECTION OF DIGNITY IN THE REVISED EUROPEAN SOCIAL CHARTER

Considerable progress regarding the protection of dignity was made by the codification of the Revised Charter. The right to dignity has been anchored in Article 26 of the Revised Charter, which can be presumed to be the first provision in international law expressly guaranteeing the protection of the dignity of the worker.

A. *The Content of the Right to Dignity at Work pursuant to Article 26 of the Revised Charter*

Article 26 of Part II of the Revised Charter specifies the right to dignity. It provides for protection against sexual and moral harassment at work. From the wording of Article 26 of Part II, it follows that the content of the right to dignity within the Revised Charter is limited. It does not entirely guarantee the "personality rights" of workers.⁹¹ As far as a contour of the right to dignity is concerned, the relationship between the declarations in Part I and

91. Rolf Birk, *Arbeitsrechtliche Neuerungen in der revidierten Europäischen Sozialcharta von 1996*, in *EUROPAS UNIVERSALE RECHTSORDNUNGSPOLITISCHE AUFGABE IM RECHT DES DRITTEN JAHRTAUSENDS: FESTSCHRIFT FÜR ALFRED SÖLLNER ZUM 70. GEBURTSTAG* 146 (Gerhard Köbler ed., 2000).

Article 26 in Part II could be of interest. By interpreting Article 26 of Part II in light of Paragraph 26 of Part I, the meaning of the protection of dignity could be widened. Admittedly there is no evidence in the case law to support this argument.

For the purposes of Article 26 of the Revised Charter, dignity is defined neither in the Appendix or the Explanatory Report nor in the case law. The Committee has not clarified the meaning of dignity. This leaves open the notion of dignity enshrined in this article.

By way of dynamic interpretation the components of the right to dignity are being resolved on a case by case basis.⁹² International human rights treaties and declarations have not been used in clarifying the content of Article 26. The Committee made no reference to the European Convention on Human Rights, in particular Article 8 thereof, in respect of Article 26.⁹³

B. The Scope of Application of Article 26 of the Revised Charter

The purpose of Article 26 is to ensure the dignity of workers in the scope of their work as well as “at work and in connexion with work.”⁹⁴ Protection must be guaranteed “at work.” Definitions of these terms for the purposes of the Revised Charter are lacking.⁹⁵ Taking a literal interpretation, the extent of the protection covers not only the stage of the performance of work but the circumstances relating to all rights and duties at work.

92. On dynamic interpretation, see HARRIS & DARCY, *supra* note 1, at 27–28; Régis Brillat, *The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact*, in SOCIAL RIGHTS IN EUROPE 37–38 (Gráinne de Búrca & Bruno de Witte eds., 2005); ROLF BIRK, THE EUROPEAN SOCIAL CHARTER § 6: Interpretation of the Charter and the Revised Charter (unpublished manuscript).

93. On the protection of private life and privacy of the worker under Article 8 of the European Convention on Human Rights, see Jacques Velu, *The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communications*, in PRIVACY AND HUMAN RIGHTS 287 (A. H. Robertson ed., 1973); L.G. Loucaides, *Personality and Privacy under the European Convention on Human Rights*, 61 BRIT. YEARB. INT'L L. 189 (1990); Lee A. Bygrave, *Data Protection Pursuant to the Right to Privacy in Human Rights Treaties*, 6 INT'L J.L. INFORM. TECH. 247, 254–83 (1998); John D.R. Craig & Hazel D. Oliver, *The Right to Privacy in the Public Workplace: Should the Private Sector be Concerned?*, 27 INDUS. L.J. 49, 53–58 (1998); Michael Ford, *Two Conceptions of Worker Privacy*, 31 INDUS. L.J. 135, 135–46 (2002); Mariann Arany Tóth, *Az Európa Tanács szerepe a munkavállalók személyes adatai védelmének szektor-specifikus szabályozásában*, in LIBER AMICORUM STUDIA IDA HÁGELMAYER DEDICATA I., 22–34 (Csilla Lehoczkyné Kollonay & Zoltán Petrovics eds., 2005).

94. European Social Charter (Revised), Explanatory Report No. 97, May 3, 1996, Eur. T.S. No. 163.

95. The word “work” is wider than employment. It includes several activities.

Article 26 of the Revised Charter applies to “all workers,” such as those in the private and public sector.⁹⁶ The term “worker” has not been defined, which allows the concept to remain flexible.⁹⁷ The meaning of “worker” has, however, been specified with respect to the liability of employers regarding to sexual harassment. The ambit of Article 26 of the Revised Charter covers persons other than an employee such as an “independent contractor,” “independent worker,” or a self-employed person.⁹⁸ All persons working for an employer irrespective of the legal classification are included. However, it is unclear whether this article refers to job applicants and apprentices, for instance.⁹⁹

C. The Nature of the Right to Dignity Pursuant to Article 26 of the Revised Charter

The right to dignity at work is guaranteed in Part I of the Revised Charter. Among the “rights and principles” laid down by Paragraph 26 of Part I is “all workers have the right to dignity at work.” Regarding the text of Part I it is not obvious whether the right to dignity should be categorized as a right or as a principle. The legal character of this provision is contentious.¹⁰⁰ The nature of this right can be evaluated in light of the obligations emanating from the Revised Charter.

D. Obligations of the Contracting Parties pursuant to Article 26 of the Revised Charter

The Contracting Parties may undertake to consider themselves bound by Article 26 of the Revised Charter.¹⁰¹ This article is referred to as a “non-hard core” article. Each state can select the obligations it wishes to be bound by.¹⁰² The two paragraphs may be accepted

96. See European Social Charter (Revised), Ratione Personae Appendix, May 3, 1996, Eur. T.S. No. 163.

97. On the distinction of the categories of worker and employee see Jean-Claude Javillier, *The Employer and the Worker: The Need for a Comparative and International Perspective*, in BOUNDARIES AND FRONTIERS OF LABOR LAW 355, 355–58 (Guy Davidov & Brian Langeville ed., 2006).

98. 1 Conclusions 2003, at 86 (Bulg.); 1 Conclusions 2003, at 203 (Fr.); 1 Conclusions 2003, at 325 (It.); 2 Conclusions 2003, at 538 (Slovn.); 2 Conclusions 2005, at 392 (Lith.); 2 Conclusions 2005, at 494 (Mold.).

99. 2 Conclusions 2003, at 633–34 (Swed.).

100. HARRIS & DARCY, *supra* note 1, at 35.

101. European Social Charter (Revised), art. A, May 3, 1996, Eur. T.S. No. 163.

102. European Social Charter (Revised), art. A(1)(e), May 3, 1996, Eur. T.S. No. 163.

individually.¹⁰³ Seventeen parties to the Revised Charter are currently bound by Article 26, paragraph 1.¹⁰⁴ States with markedly differing traditions have accepted this provision.

1. The Character of the Undertakings

The substantive guarantees laid down in Article 26 of the Revised Charter have been the subject of controversy. This article requires the Parties to “undertake . . . to promote awareness, information and prevention of sexual harassment . . . and to take all appropriate measures to protect workers.” These are complex obligations formulated in vague terms. The meaning of the undertakings under this article is open to interpretation.¹⁰⁵

The proper understanding of the term “undertake” was one of the most hotly debated topics in drafting the Charter.¹⁰⁶ It was discussed how the Charter could serve as a guide for a European social policy, for the progressive harmonization of social legislation at the highest level and prove that “European integration would not run counter the interest of workers.”¹⁰⁷ The concrete determination of the responsibilities of the Governments in the implementation of the

103. European Social Charter (Revised), art. Explanatory Report No. 98, May 3, 1996, Eur. T.S. No. 163.

104. See COUNCIL OF EUROPEAN SOCIAL CHARTER, ACCEPTANCE OF PROVISIONS, http://www.coe.int/t/e/human_rights/esc/1_general_presentation/Provisions.pdf; Article 26(2) of the Revised Charter has been accepted by sixteen states.

105. On approaches to typologies of state duties imposed by human rights treaties, see, e.g., Asbjorn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L.J. 35, 37–38 (1989); Leckie Scott, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 81, 90–91 (1998); Chisanga Puta-Chekwe & Nora Flood, *From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights*, in GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 43 (Isfahan Merali & Valerie Oosterveld eds., 2001); Olivier de Schutter, *The Protection of Social Rights by the European Court of Human Rights*, in SOCIAL, ECONOMIC AND CULTURAL RIGHTS: AN APPRAISAL OF CURRENT EUROPEAN AND INTERNATIONAL DEVELOPMENTS 209–11 (Peter Van der Auweraert et al. eds., 2002); MAGDALENA SEPÚLVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 248 (2003); MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 49 (2003); Bob Hepple, *Rights at Work*, in DECENT WORK: OBJECTIVES AND STRATEGIES 37 (Dharam Ghai ed., 2006).

106. Committee of Ministers Report of the Social Committee, Strasbourg, February 11, 1957, CM (57) 24, in 4 TRAVAUX PRÉPARATOIRES (Provisional Edition), at 331.

107. Committee of Ministers Report of the Social Committee, Strasbourg, February 11, 1957, CM (57) 24, in 4 TRAVAUX PRÉPARATOIRES, at 331; Tripartite Conference convened by the International Labour Organization at the request of the Council of Europe, Strasbourg, December 1–12, 1958, Record of Proceedings 1959, in V TRAVAUX PRÉPARATOIRES, at 418.

Charter caused a problem.¹⁰⁸ Similar uncertainties arise in interpreting the Revised Charter.

Article 26 of the Revised Charter imposes positive obligations on the Contracting Parties. “Promotion” and “protection” encompass activities of governments; states have to afford the enjoyment of rights of workers under Article 26 of the Revised Charter.¹⁰⁹

2. The Extent of the Undertakings

The content of the obligations enshrined in Article 26 of the Revised Charter have been partially clarified in the Appendix to the Revised Charter and in the case law. The “duty to promote” comprises first of all the effort to change behavior through education.¹¹⁰ States must submit data on awareness-raising, information and preventive activities referring to the target groups, expenditure, training schemes, publications, and specialized infrastructures such as ombudsman and counseling schemes.¹¹¹

The “duty to protect” is not mentioned in the Revised Charter. It is arguable what is meant by the obligation “to take all appropriate measures to protect.” The Explanatory Report affirms that “it emphasizes the promotion of awareness and prevention of sexual harassment and victimisation, but does not require that Parties to ensure protection against such conduct.”¹¹² According to this commentary, the state is required to promote the prevention of the violation of the integrity, freedom, and rights of workers.¹¹³ It could mean abstaining from interfering with the exercise of the rights of workers. It is not clear whether the right to dignity at work implies the right not to be harassed or victimized in the workplace or in relation to work.¹¹⁴

The Contracting Parties are required to make data available on the protective measures in place. They are to provide details on legal

108. Report of the Social Committee, Strasbourg, July 31, 1957, CM (57) 107, in TRAVAUX PRÉPARATOIRES, at 344, 352.

109. On “the intervention of the state in order that the individual may enjoy his freedom,” see Tripartite Conference convened by the International Labour Organization at the request of the Council of Europe, Strasbourg, December 1–12, 1958, Record of Proceedings 1959, in V TRAVAUX PRÉPARATOIRES, at 415.

110. SEPÚLVEDA, *supra* note 105, at 223.

111. Form for the reports to be submitted in pursuance of the revised European Social Charter adopted by the Committee of Ministers on January 17, 2001.

112. European Social Charter (Revised), Explanatory Report No. 97, May 3, 1996, Eur. T.S. No. 163.

113. See Eide, *supra* note 105, at 37; Scott, *supra* note 105, at 108.

114. See European Social Charter (Revised), Explanatory Report No. 97, May 3, 1996, Eur. T.S. No. 163.

sanctions, relevant court procedures, employers' liability, reinstatement, the amount of damages in cases of dismissal or voluntary resignation, and on measures combating any form of retaliation.¹¹⁵ In our view the undertakings are difficult to delineate since the Revised Charter does not coherently explain the meaning of the obligations and in the case law special measures have been imposed on the responsibilities of the Contracting Parties.

3. Implementation of Undertakings Relating to Article 26

Article 26 grants discretion to each state in the implementation of the Revised Charter. The expression "to take all appropriate measures" allows the stage of development of the national legal system to be taken into account. The traditions across the various countries are respected in the supervision of compliance with the Revised Charter.

The realization of the obligations is influenced by the principles of the supervision of conformity of states' reports. It is debatable whether Article 26 requires the enactment of legislation in order to safeguard workers' rights.

Pursuant to Article I, Articles 1 to 31 of Part II of the Revised Charter are to be implemented by laws and regulations; agreements between employers or employers' organizations and workers' organizations; a combination of those two methods or other appropriate means. This general rule on the implementation of the undertakings is qualified by the special commentary in the Appendix to the Revised Charter. It states that "this article does not require that legislation be enacted by the Parties." On the contrary, Article 26 of the Revised Charter has been interpreted by the Committee as imposing binding obligations upon the parties. The Committee asserts that states must have or adopt legislation, of some form and of a certain standard, in order to comply with the requirements of both paragraphs.¹¹⁶ However, there is a minority view that Article 26 does not call for any activity of the legislature to enact provisions on sexual harassment and victimization.¹¹⁷

115. Form for the reports to be submitted in pursuance of the revised European Social Charter adopted by the Committee of Ministers on January 17, 2001.

116. 1 Conclusions 2003, at 86 (Bulg.); 1 Conclusions 2003, at 325 (It.); 2 Conclusions 2003, at 392 (Lith.); 2 Conclusions 2003, at 494 (Mold.).

117. See Dissenting opinion of Mr. S. Evju, joined by Mr. R. Birk and Mr. K. Grillberger, *in* 1 Conclusions 2003, at 95 (Bulg.); 1 Conclusions 2003, at 239 (Fr.); 1 Conclusions 2003, at 353 (It.); 2 Conclusions 2003, at 565 (Slovn.); 2 Conclusions 2003, at 660 (Swed.).

The Revised Charter contains no special guidelines on the effectiveness of the realization of the undertakings deriving from Article 26.¹¹⁸ The Committee sets the standards on the effective exercise of the right to dignity at work by assessing compliance. States must take steps to enforce the measures prescribed by Article 26. Consultation between employers' and workers' organizations and the authorities is of particular relevance.¹¹⁹ In this regard, the procedure, level, content, and frequency of the consultation are of crucial importance. Employers as well as employers' and workers' organizations play an important role in the effective protection of the right to dignity at work. There is an obligation on the state to involve employers' and workers' organizations in guaranteeing the right to dignity by creating policies and national programs. We conclude that the involvement of these organizations can enhance the quality of the implementation of Article 26.

4. Restrictions on the Right to Dignity at Work

The right to dignity at work can exceptionally be limited if the restrictions or limitations "are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals."¹²⁰ These requirements as to the right to dignity have not been specified. The restrictions on Article 26 have not been considered in the case law. The "margin of appreciation" the state is given in deciding the restrictions is unclear.

V. PROTECTION OF DIGNITY AS REGARDS SEXUAL HARASSMENT UNDER ARTICLE 26, PARAGRAPH 1 OF THE REVISED CHARTER

A. *The Role of Article 26, paragraph 1 of the Revised Charter*

Article 26, paragraph 1 of the Revised Charter is designed to protect workers from sexually harassing behavior. In international labor law, protection against sexual harassment is guaranteed with respect to discrimination in employment. It is addressed as a form of gender-specific violence in the workplace.¹²¹ In the broader sense,

118. See European Social Charter (Revised), art. I(2), May 3, 1996, Eur. T.S. No. 163.

119. Form for the reports to be submitted in pursuance of the revised European Social Charter adopted by the Committee of Ministers on January 17, 2001.

120. European Social Charter (Revised), art. G(1), May 3, 1996, Eur. T.S. No. 163.

121. Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No. 19, ¶¶ 17, 18.

sexual harassment is treated as a form of sex discrimination that undermines “integrity and dignity and well-being of workers.”¹²²

Legal regulation of sexual harassment takes various forms from country to country. In the European Union most states have legislation that could be applied to combat sexual harassment.¹²³

The Committee examines provisions of criminal law and tort law, in particular relevant case law and statutes dealing with equality of treatment. Details on prevention and protective measures in regard to sexual harassment have been expounded in the case law.

B. Interaction between the Concepts of Dignity, Harassment, and Discrimination

The relationship between the protection of dignity and sexual harassment is complex and is originally rooted in a confusion of subjects in Community Law.¹²⁴ Sexual harassment was conceived of in terms of “protection of dignity” at work. The dignity of women was a prime concern at the dawn of the debate on sexual harassment.¹²⁵ The main concept is now generally being discussed as the “dignity” of everybody in the workplace.¹²⁶ This tendency is indirectly influencing the assessment of compliance with Article 26 of the Revised Charter.

Sexual harassment is identified as an instance of sex discrimination because of the crucial importance of the gender of the victim.¹²⁷ The subject is identified within the equal treatment doctrine

122. Convention No. 111 Discrimination (Employment and Occupation), 1958, Equality in Employment and Occupation, General Survey of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 91st Sess., Report III. (Part 1A) 463 (2003).

123. DIRECTORATE-GENERAL FOR EMPLOYMENT, INDUS. RELATIONS & SOC. AFFAIRS, EUR. COMM'N, SEXUAL HARASSMENT AT THE WORKPLACE IN THE EUROPEAN UNION 11 (1999).

124. Mark Bell, *Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination*, in SOCIAL RIGHTS IN EUROPE 270 (Gráinne de Búrca & Bruno de Witte eds., 2005); Susanne Baer, *Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 582 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); GAY MOON & ROBIN ALLEN, DIGNITY DISCOURSE IN DISCRIMINATION LAW: A BETTER ROUTE TO EQUALITY? 23 (2006), available at <http://www.justice.org.uk/images/pdfs/dignityfinal.pdf>.

125. MICHAEL RUBENSTEIN, THE DIGNITY OF WOMEN AT WORK: A REPORT ON THE PROBLEM OF SEXUAL HARASSMENT IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES 24 (1987); SUSANNE BAER, WÜRDE ODER GLEICHHEIT? 182 (1995).

126. Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination versus Dignity* 9–10 (Yale Law Sch. Public Law Legal Theory Research Paper Series, Paper No. 37), available at <http://papers.ssrn.com/abstract=383900>.

127. Commission Recommendation No. 92/131/EEC of 27 November 1991, Annex: A Code of Practice on Measures to Combat Sexual Harassment, 1992 O.J. (L 049) 1–8.

and it has become widely accepted that sexual harassment is an instance of sex discrimination.¹²⁸

In the case law the concepts of dignity, harassment, and discrimination have not been sharply distinguished.¹²⁹ The meaning of dignity is not discussed completely in the context of harassment and discrimination.

A distinction has been drawn between sexual harassment based on gender and the legal appearance of discrimination. It has been argued that “sexual harassment is not necessarily a form of discrimination based on gender but always qualifies as a breach of equal treatment manifested mainly by an insistent preferential or retaliatory attitude, directed towards one or more persons, or by an insistent attitude of other nature which may harm their dignity or their career.”¹³⁰ The Committee is of the view that “there is no need for a state’s legislation to make express reference to harassment where that state’s law encompassed measures making it possible to afford employees effective protection against various forms of discrimination.”¹³¹

C. Defining Sexual Harassment pursuant to Article 26, paragraph 1 of the Revised Charter

1. The Notion of Sexual Harassment

In the Explanatory Report to the Revised Charter, sexual harassment is defined very briefly to mean “unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of workers, including the conduct of superiors and colleagues.”¹³² The Committee made no attempt to elaborate on types of unwanted conduct of a sexual nature or other conduct based on sex. Types of behavior such as unwanted physical contact, unwanted verbal contact,

128. *See id.*; Parliament and Council Directive 2002/73/EC, art. 2 § 3, 2002 O.J. (L 269) 15 (EC); Rachel Mead Zweighaft, *What’s the Harm? The Legal Accommodation of Hostile Environment Sexual Harassment*, 18 COMP. LAB. L.J. 462 (1997); KATHRIN S. ZIPPEL, *THE POLITICS OF SEXUAL HARASSMENT* 83 (2006); CHRISTA TOBLER, *INDIRECT DISCRIMINATION* 49 (2005); EVELYN ELLIS, *EU ANTI-DISCRIMINATION LAW* 23–241 (2005).

129. In national legal systems these concepts are interrelated, too. *See, e.g.*, *Miles v. Gilbank and another*, [2006] Indus. Court Rep. 1297, CA (U.K.).

130. 1 Conclusions 2003, at 85 (Bulg.); 1 Conclusions 2003, at 202 (Fr.); 1 Conclusions 2003, at 324 (It.); 2 Conclusions 2003, at 537 (Slovn.); 2 Conclusions 2003, at 633 (Swed.); 1 Conclusions 2005, at 389 (Lith.); 2 Conclusions 2005, at 493 (Mold.).

131. 1 Conclusions 2003, at 85 (Bulg.); 1 Conclusions 2003, at 202 (Fr.); 1 Conclusions 2003, at 324 (It.); 2 Conclusions 2003, at 537 (Slovn.); 2 Conclusions 2003, 633 (Swed.); 1 Conclusions 2005, 389 (Lith.); 2 Conclusions 2005, at 493 (Mold.).

132. European Social Charter (Revised), Explanatory Report No. 99, May 3, 1996, Eur. T.S. No. 163.

unwanted non-verbal contact, and other conduct have not been specified. The distinction between conduct of a sexual nature and conduct based on sex has not been clarified. No examples have been provided asserting that the harassment was based on sex. The effect of the conduct on the dignity of the worker has not been analyzed. A test for assessing the severity of harassment has not been worked out. Types of sexual harassment such as "quid pro quo" harassment or "hostile environment" harassment have not been developed.

The notion of sexual harassment in national legislation is of great importance in the supervision of compliance.¹³³ States must indicate which forms of behavior are considered sexual harassment. The types of behavior that, according to the states' reports, do not conform with the right to dignity at work are manifold.¹³⁴ They can vary according to the cultural context. The forms of behavior constituting sexual harassment have not been categorized in the case law.

2. The Model of the Definition Contained in the Revised Charter

The draft text on sexual harassment was more precise than the current provision. The definition of sexual harassment contained the elements enshrined in the Commission's Recommendation 92/131/ECC.¹³⁵ It served as a model for the incorporation of sexual harassment in the Revised Charter.¹³⁶

The draft version of Article 26, paragraph 1 of the Revised Charter involved characteristics of conduct, the elements of prevention of retaliatory measures affecting the employment rights of the worker, and of the role of social partners. Originally the concept was construed broadly. Details were given of the implementation measures and the personal scope of the draft provision. The role of collective agreements was highly regarded.

133. *See, e.g.*, Deuxième rapport sur l'application de la Charte sociale européenne révisée soumis par le gouvernement de l'Italie Cycle 2003, at 177, RAP/RCHA/IT/II (2002); 1 Conclusions 2003, at 85 (Bulg.); 1 Conclusions 2003, at 202 (Fr.); 1 Conclusions 2005, at 389 (Lith.).

134. *See, e.g.*, THE REPUBLIC OF LITHUANIA FOURTH REPORT ON THE IMPLEMENTATION OF THE EUROPEAN SOCIAL CHARTER FOR THE PERIOD FROM 1 JANUARY 2003 TO 31 DECEMBER 2004, at 351 (2005); Le Gouvernement de l'Italie Sixième rapport sur l'application de la Charte sociale européenne révisée pour la période du 1er janvier 2001 au 31 décembre 2004, RAP/PCha/IT/VI (2007), at 171; THE SECOND PERIODIC REPORT OF THE REVISED EUROPEAN SOCIAL CHARTER OF FINLAND FOR THE PERIOD 1 AUGUST 2001 TO 31 DECEMBER 2004, at 72 (2005); NATIONAL REPORT OF THE BULGARIA FOR THE PERIOD 1ST JANUARY 2001 TO 31ST DECEMBER 2004, at 139 (2005).

135. CHARTE/REL (93) 19 Strasbourg, August 11, 1993, at 2.

136. Commission Recommendation No. 92/131/EEC of 27 November 1991, Annex: A Code of Practice on Measures to Combat Sexual Harassment, 1992 O.J. (L 049) 1-8 (EC); CHARTE/REL (93) 19 Strasbourg, 11 August 1993, at 29.

The definition of sexual harassment in the Explanatory Report is similar in its wording to the Commission's Recommendation 92/131/EEC.¹³⁷ Sexual harassment constitutes an intolerable violation of the dignity of workers in virtue of the Recommendation.¹³⁸ This definition is not limited to "quid pro quo" harassment; it includes those cases where the effect of the harassment is to create a hostile, abusive, or offensive working environment.¹³⁹ Additional conditions have been mentioned in helping discover the types of sexual harassment.

The Code of Practice contains a more specific definition of sexual harassment. It gives examples of behavior that may be considered to constitute sexual harassment.¹⁴⁰ Despite the common aspects of the definitions of sexual harassment no reference to the Recommendation has been made by the Committee.

3. The Impact of Directive 76/207/ECC on the Notion of Sexual Harassment

In light of the developments in national legislation by the implementation of Directive 2002/73/EC, the basis of the interpretation of the notion of sexual harassment can vary.¹⁴¹ Directive 76/207/ECC provides a more sophisticated notion of sexual harassment than the Revised Charter.¹⁴²

There are differences between the definitions of sexual harassment in the Revised Charter and in the Directive. Types of unwanted conduct are specified in the Directive and include any form of unwanted verbal, non-verbal, or physical conduct of a sexual

137. Commission Recommendation No. 92/131/EEC of 27 November 1991, art. 1, 1992 O.J. (L 049) 1.

138. Council Resolution No. 90/C 157/02 of 29 May 1990, 1990 O.J. (C 157) 3-4.

139. On "quid pro quo" harassment, see FRANCIS ACHAMPONG, *WORKPLACE SEXUAL HARASSMENT LAW* 17 (1999); ABIGAIL C. SAGUY, *WHAT IS SEXUAL HARASSMENT?* 22 (2003); ANNA-MARIA MARSHALL, *CONFRONTING SEXUAL HARASSMENT* 39-41 (2005); Zweighaft, *supra* note 128, at 438-41; ZIPPEL, *supra* note 128, at 97.

140. A Code of Practice on Measures to Combat Sexual Harassment, Annex to the Recommendation 92/131/EEC of 27 November 1991 on the Protection of the Dignity of Women and Men at Work No. 92/C 27/04 of 24 February 1992, 1992 O.J. (L 049) 1-8.

141. Parliament and Council Directive 2002/73/EC, art. 2 § 2, 2002, O.J. (L 269) 15 (EC); see also Konstantinos D. Magliveras, *The Regulation of Workplace Sexual Harassment in Greece: Legislation and Case Law Analysis*, 20 *INT'L J. COMP. LAB. L. & INDUS. REL.* 80 (2004).

142. For the purposes of the Directive, sexual harassment is defined as follows: "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment." Parliament and Council Directive 2002/73/EC, art. 1, 2002 O.J. (L 269) 15 (EC) (amending Directive 76/207/EEC).

nature.¹⁴³ The Revised Charter covers above all “other conduct based on sex.” Compared to the prohibition in the Directive this is a narrower criterion. According to the Directive, the violation of dignity as a purpose or an effect of the conduct is a constitutive element of sexual harassment. The Revised Charter contains the phrase “affecting the dignity of workers,” which could be interpreted as a less harmful form of conduct. The notion of sexual harassment in the Directive differs from the definition in the Revised Charter with respect to the hostile environment doctrine. The Explanatory Report to the Revised Charter does not place emphasis on this aspect. There is a significant difference as to the structuring of sexual harassment in the framework of discrimination.¹⁴⁴

4. Lack of a Comprehensive Definition

The definition of sexual harassment is highly contentious. The elements of sexual harassment have not been completely elaborated upon in the case law. They are influenced by culture and values across the various countries.¹⁴⁵ This factor makes it difficult to flesh out an integrative model on sexual harassment.

The requirements identified in the case law do not provide any detailed guidance for the implementation of Article 26, paragraph 1 of the Revised Charter. We consider that a comprehensive definition of sexual harassment is indispensable to accurate the satisfaction of undertakings pursuant to Article 26, paragraph 1 of the Revised Charter.

D. Some Elements of Assessment of Compliance with Article 26, paragraph 1 of the Revised Charter

Compliance of state reports with Article 26, paragraph 1 of the Revised Charter is examined closely. States are to submit information on the kinds of behavior constituting sexual harassment, on preventive activities, on the role of the employer, and on protective measures. The legal provisions and the well-established case law of

143. On the problem of the implementation of the passage „conduct related to the sex of a person” in the Directive 2002/73/EC, see Equal Opportunities Commission v. Secretary of State for Trade and Industry, [2007] I.R.L.R. 327, HC (U.K.).

144. According to the Directive, sexual harassment is “deemed to be discrimination on the grounds of sex.” Directive 76/207/EEC, art. 2(3), 1976 O.J. (L 269) 15.

145. Harsh K. Luthar & Vipin K. Luthar, *A Theoretical Framework Explaining Cross-Cultural Sexual Harassment: Integrating Hofstede and Schwartz*, 28 J. LAB. R. 169, 185 (2007).

the national legal systems are important factors in supervision.¹⁴⁶ A negative conclusion was reached on the Moldovan report on the basis that “neither legislation nor any other regulatory or administrative measure provides for the necessary preventive and reparatory means to effectively protect employees against sexual harassment.”¹⁴⁷

1. Awareness-Raising, Information, and Preventive Activities

One of the significant obligations of states is “to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work.” The content of this duty has not been detailed in the Revised Charter. The Committee focuses on the activities of trade unions,¹⁴⁸ regional agencies, health and safety committees,¹⁴⁹ NGOs, Governments,¹⁵⁰ and employers.¹⁵¹

Dialogue with social partners is of vital importance.¹⁵² Collective agreements serve as a suitable tool for tackling sexual harassment. Trade unions or employees’ representatives can contribute to the making and monitoring of policy in this field.

Preventive practices combating sexual harassment are improving in accordance with the national traditions. Several institutions are dealing with preventive actions across countries.¹⁵³

Awareness-raising programs are aimed at giving advice to the workers. Dissemination of information by Governments is bound to draw attention to the problems that will become widely known among the workers. Protective measures can bolster the enforcement of statutes, regulations, and codes of practice on the sexual harassment. The implementation of the Code of Practice of the European Commission is a decisive factor in supervision.¹⁵⁴

Criteria for an effective information policy have not been explicated. Awareness-raising campaigns must in particular cover information for workers concerning “the nature of the behavior in

146. “The effectiveness of the legal protection against sexual harassment depends on the interpretation given, for each applicable legal provision, by national courts.” 1 Conclusions 2003, at 86 (Bulg.); 1 Conclusions 2005, at 392 (Lith.); 2 Conclusions 2005, 494 (Mold.).

147. 2 Conclusions 2005, at 495 (Mold.).

148. 1 Conclusions 2003, at 325 (It.).

149. 1 Conclusions 2003, at 203 (Fr.).

150. 1 Conclusions 2003, at 86 (Bulg.).

151. 1 Conclusions 2003, at 203 (Fr.).

152. 2 Conclusions 2003, at 634 (Swed.).

153. The cooperation of the Office for Equal Opportunity with employers’ and workers’ organizations was found to be in compliance with the Revised Charter. 2 Conclusions 2003, at 538 (Slovn.).

154. *Id.*

question and the available remedies.”¹⁵⁵ Training and education facilities have not been considered in the case law.

2. Liability of Employers

The “scope” of employers’ personal liability is a complex determination. It is asked “whether an employer can be held liable towards persons working for him in a capacity other than as an employee . . . who have suffered sexual harassment from employees under his responsibility or persons working at premises under his responsibility and whether the obligation and liability of the employer towards workers . . . extend to sexual harassment suffered by persons not employed by him such as customers, visitors, clients, guests, etc.”¹⁵⁶

The principles of liability are treated variously in the countries that have accepted Article 26 of the Revised Charter.¹⁵⁷ They are complemented by legislation or tort law and are developed by the courts. In the case law, they are examined in close connection with remedies and sanctions.

3. Remedies and Sanctions

The function of liability depends on the quality of the remedies and sanctions. They play an important role in the supervision of compliance with Article 26, paragraph 1 of the Revised Charter.

There are a wide range of measures that can be applied in the event of sexual harassment. Deterrent sanctions may involve a disciplinary measure or dismissal. In many countries the rights of workers are additionally protected through criminal law.

Above all, compensation for damage is of fundamental importance. The Committee takes note of the “nature and scale of damages that may be granted to victims, in order to assess whether these damages are sufficiently reparatory for the victim and deterrent for the employer.”¹⁵⁸ The effectiveness of compensation for financial loss, emotional distress, or injury has not been comprehensively

155. 1 Conclusions 2003, at 325 (It.); 1 Conclusions 2005, at 392 (Lith.); 2 Conclusions 2005, at 494 (Mold.).

156. 1 Conclusions 2003, at 325 (It.).

157. Robert Husbands, *Sexual Harassment Law in Employment: An International Perspective*, 131 INT’L LAB. REV. 535, 550 (1992); Eoin Quill, *Employers’ Liability for Bullying and Harassment*, 21 INT’L J. COMP. LAB. L. & INDUS. REL. 645–66 (2005); 2 Conclusions 2003, at 634 (Swed.).

158. 1 Conclusions 2003, at 86 (Bulg.); 1 Conclusions 2003, at 203 (Fr.).

assessed. The right to reinstatement in the case of compelled dismissal of the employee affected by sexual harassment is a key point of the supervision of compliance.¹⁵⁹ The lack of civil or administrative law provisions enabling compensation for material and moral damage before courts or reinstatement in the event of unlawful dismissal is contrary to the Revised Charter.¹⁶⁰

4. Court Procedures

States must submit information on court procedures for cases of sexual harassment. Other forms of procedure, for instance mediation, are also examined in part.¹⁶¹ As far as the procedural aspects are concerned, the Committee noted that “effective protection of employees requires somewhat of 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.”¹⁶² Workplace complaint mechanisms have not been analyzed under this article.

E. Significance of Article 26, paragraph 1 of the Revised Charter

The nature of the undertakings and the character of supervision are a formidable influence on the content of the right to dignity. The concept of sexual harassment is inherently very complex, a fact that is of great impact on the development of unified principles of compliance with Article 26, paragraph 1 of the Revised Charter. In our view attention should be paid to the assessment of the violation of dignity. Classification of the attacks on the dignity of workers according to their gravity can be useful in developing consolidated requirements on sexual harassment.

VI. PROTECTION OF DIGNITY IN RESPECT OF MORAL HARASSMENT ACCORDING TO ARTICLE 26, PARAGRAPH 2 OF THE REVISED CHARTER

Article 26, paragraph 2 of the Revised Charter is aimed at protecting the dignity of workers from certain forms of human

159. 1 Conclusions 2003, at 86 (Bulg.); 1 Conclusions 2003, at 325 (It.); 2 Conclusions 2003, at 538 (Slovn.).

160. 2 Conclusions 2005, at 495 (Mold.).

161. 1 Conclusions 2003, at 202-203 (Fr.); 2 Conclusions 2003, at 634 (Swed.); 1 Conclusions 2005, at 391 (Lith.).

162. 1 Conclusions 2003, at 85 (Bulg.).

behavior at work. This is the first provision in international law to “establish a fundamental right to protection of human dignity against harassment creating a hostile working environment related to a specific characteristic of a person.”¹⁶³ This provision of the Revised Charter is a touchstone for the protection of workers’ integrity. Some initiatives have been launched by the International Labour Organization to combat this phenomenon.¹⁶⁴ Bullying in the workplace is considered among forms of violent behavior at work.¹⁶⁵

A. Concept of Moral Harassment pursuant to Article 26, paragraph 2 of the Revised Charter

Article 26, paragraph 2 of the Revised Charter refers to moral harassment. The term has been identified in the case law as a translation of the French expression *harcèlement moral*. The term “moral harassment” has not been uniformly employed in academic writings.¹⁶⁶ The types of “forms of victimizing conduct” vary from country to country. In the Revised Charter itself the phenomenon is not unambiguously explicated.

The notion of moral harassment is preferred in the supervision of compliance irrespective of the variety of subjects described as moral harassment in national legal systems. In the states’ reports within the scope of the Article 26, paragraph 2 of the Revised Charter, several areas of the protection of workers’ dignity—such as respect of integrity of the employee, protection of privacy and the employee’s personal data, personal relations, civil status, activities, and appearance—are indicated.¹⁶⁷ Furthermore, the right to private life, the privacy of personal correspondence and telephone conversations, and freedom of convictions, inter alia, are highlighted concerning the

163. 1 Conclusions 2003, at 87 (Bulg.); 1 Conclusions 2003, at 204 (Fr.); 1 Conclusions 2003, at 326 (It.); 2 Conclusions 2003, at 539 (Slovn.); 2 Conclusions 2003, at 634–35 (Swed.); 1 Conclusions 2005, at 395 (Lith.); 2 Conclusions 2005, at 495 (Mold.).

164. Code of Practice on Workplace Violence in Service Sectors and Measures to Combat this Phenomenon, Meeting of Experts to Develop a Code of Practice on Violence and Stress at Work in Services: A Threat to Productivity and Decent Work (Oct. 8–15, 2003).

165. DUNCAN CHAPPEL & VITTORIO DI MARTINO, *VIOLENCE AT WORK* 16 (2006).

166. *Id.* at 22; Wolfgang Däubler, *Mobbing und Arbeitsrecht*, 50 B.B. 1347 (1995); MARTIN WOLMERATH, *MOBBING IM BETRIEB* 23–25 (2004); Béatrice Lapérou-Schneider, *Les mesures de lutte contre le harcèlement moral*, *DROIT SOCIAL*, Mar. 2, 2002, at 314; IDS EMPLOYMENT LAW SUPPLEMENT: *STRESS AT WORK* 9 (SERIES 2) 123 (2003); ELIZABETH GILLOW, MARTIN HOPKINS & AUDREY WILLIAMS, *HARASSMENT AT WORK* 83–84 (2003); Gina Vega & Debra R. Comer, *Bullying and Harassment in the Workplace*, in *MANAGING ORGANIZATIONAL DEVIANCE* 183 (Roland E. Kidwell & Christopher L. Martin eds., 2005).

167. SIXTH REPORT OF THE REPUBLIC OF SLOVENIA ON THE IMPLEMENTATION OF THE REVISED EUROPEAN SOCIAL CHARTER FOR THE REFERENCE PERIOD FROM 1 JANUARY 2001 TO 31 DECEMBER 2004 (2005).

protection of workers against actions emphasized in Article 26, paragraph 2 of the Revised Charter.¹⁶⁸ The concept of moral harassment has not been clearly and concretely determined. Due to the wording of Article 26, paragraph 2 of the Revised Charter, it covers heterogeneous issues that cannot be listed exhaustively.

The assessment of conformity of the reports on moral harassment follows the scheme of supervision of Article 26, paragraph 1 of the Revised Charter. The states are required to submit information on awareness-raising activities, the role of employer, specialized infrastructures, protective measures, and questions of liability and reinstatement with respect to reprehensible or distinctly negative and offensive actions.¹⁶⁹

B. Distinction between Moral and Sexual Harassment

The concept of moral harassment in the case law has to some extent been confined in comparison to sexual harassment. However, moral harassment is an autonomous subject requiring protection under the Revised Charter. It differs from sexual harassment.¹⁷⁰ Article 26, paragraph 2 of the Revised Charter “aims at forms of victimising conduct affecting the right to dignity at work (victimisation, defined as bullying) other than sexual harassment.”¹⁷¹ Without doubt, there are similarities between the two types of behavior and activities amounting to sexual harassment can overlap with behavior constituting moral harassment.

C. Classification of Moral Harassment with regard to Article 26, paragraph 2 of the Revised Charter

The trend in the European Community with respect to the regulation of harassment has an effect on the assessment of the states' reports. The prohibition of harassment based on discrimination on the grounds of gender, ethnic origin, disabilities or sexual orientation influence the supervision of compliance.¹⁷² The relevant Directives define harassment as unwanted conduct related to the sex of a person or to his religion or belief, disability, age or sexual orientation as

168. THE REPUBLIC OF LITHUANIA FOURTH REPORT ON THE IMPLEMENTATION OF THE EUROPEAN SOCIAL CHARTER FOR THE PERIOD FROM 1 JANUARY 2003 TO 31 DECEMBER 2004, at 357 (2005).

169. See, e.g., 2 Conclusions 2003, at 540 (Slovn.).

170. Explanatory Report to the Revised European Social Charter No. 100.

171. *Id.*

172. 2 Conclusions 2003, at 635 (Swed.).

regards employment and occupation, or related to racial or ethnic origin which occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.¹⁷³

This definition differs from the definition contained in Article 26, paragraph 2 of the Revised Charter. It encompasses the subjective expectations of the person concerned, the violation of his dignity, and the negative effect on the social environment. The Directives stress concrete personal traits that could be a basis for harassment. The elements of this definition are more precise than the description in the Revised Charter. Concerning moral harassment, aspects of the protection of the dignity of workers are not identified clearly by Article 26, paragraph 2 of the Revised Charter. The “specific characteristics of a person” have not been elucidated in the case law. A clear distinction between moral harassment and other forms of harassment has not been undertaken. The relationship of the concept of moral harassment to discrimination has not been identified.¹⁷⁴

D. *The Definition of Moral Harassment*

Moral harassment has been defined in the text of Article 26, paragraph 2 of the Revised Charter.¹⁷⁵ The Swedish national regulations were the basis for the draft of this paragraph.¹⁷⁶ The wording of the description closely follows the definition of “victimization” given in the Swedish Work Environment Act.¹⁷⁷

The meaning of victimizing conduct covers all “recurrent reprehensible or distinctly negative and offensive actions directed against individual workers at the workplace or in relation to their work.” According to the case law, actions shall constitute humiliating behavior.¹⁷⁸

To constitute moral harassment within the scope of Article 26, paragraph 2 of the Revised Charter there must have been actions

173. Council Directive of 76/207/EC, art. 2(2), 1976 O.J. (L 39) 40–42 (EC); Council Directive 2000/78/EC, arts. 1, 2(3), 2000 O.J. (L 303) 16, 18 (EC); Council Directive 2000/43/EC, arts. 2(1), 2(3), 2000 O.J. (L 180) 22, 24 (EC).

174. TOBLER, *supra* note 128, at 48–49; Ivana Bacik, *Harassment, in* EQUALITY IN DIVERSITY 169–70 (Eilis Barry & Cathryn Costello eds., 2003); Miriam Driessen-Reilly & Bart Driessen, *Don't Shoot the Messenger: A Look at Community Law Relating to Harassment in the Workplace*, 28 EUR. L. REV. 493, 495 (2003).

175. Explanatory report to the Revised European Social Charter No. 100.

176. CHARTE-REL (94) 26 FCR 9426 Rapport Sommaire 12e réunion, at 2.

177. 2 Conclusions 2003, at 635 (Swed.).

178. 1 Conclusions 2003, at 87 (Bulg.); 1 Conclusions 2003, at 204 (Fr.); 1 Conclusions 2003, at 326 (It.); 2 Conclusions 2003, at 539 (Slovn.); 2 Conclusions 2003, at 635 (Swed.); 1 Conclusions 2005, at 395 (Lith.); 2 Conclusions 2005, at 495 (Mold.).

occurring on a recurrent basis that obviously contravene the norms of human behavior when judged objectively and that have a degrading impact on the individual worker's life at the workplace or in relation to the work in their everyday life. The definition of moral harassment is fraught with difficulties.¹⁷⁹ It comprises two main features of bullying at work, namely "repeated and enduring aggressive behaviours that are intended to be hostile and/or perceived as hostile by the recipient."¹⁸⁰

The meaning of recurrent, reprehensible, and distinctly negative offensive action cannot be standardized. It is open to interpretation what behavior or conduct can lead to moral harassment.¹⁸¹ The "actions" have not been described exhaustively. The grounds of victimizing conduct have not been enumerated. In the case law it was acknowledged that the definition laid down in the French Labor Code essentially reflects the behavior involved in Article 26, paragraph 2 of the Revised Charter.¹⁸²

It is difficult to substantiate the outcome of humiliation at work. The effects of moral harassment can produce negative individual, organizational, and client/customer group consequences.¹⁸³ The question arises as to what actions could be sufficiently serious to amount to moral harassment.

179. CHAPPEL & DI MARTINO, *supra* note 165, at 20–22; Driessen-Reilly & Driessen, *supra* note 174, at 498; Margaret H. Vickers, *Bullying as Unacknowledged Organizational Evil: A Researcher's Story*, 13 EMP. RESP. & RTS. J. 206 (2001); Helge Hoel & David Beale, *Workplace Bullying, Psychological Perspectives and Industrial Relations: Towards a Contextualized and Interdisciplinary Approach*, 44 BRIT. J. INDUS. REL. 239, 242–44 (2006); RALF D. BRINKMANN, *MOBBING, BULLYING, BOSSING* 11–20 (2002); MARTINA BENECKE, *MOBBING* 7–26 (2005); MARIE-FRANCE HIRIGOYEN, *MALAISE DANS LE TRAVAIL* 61–70 (2001).

180. Ståle Einarsen, Helge Hoel, Dieter Zapf & Cary L. Cooper, *The Concept of Bullying at Work: The European Tradition*, in *BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE* 7 (Ståle Einarsen, Helge Hoel, Dieter Zapf & Cary L. Cooper eds., 2003); Claire Mayhew et al., *Measuring the Extent of Impact from Occupational Violence and Bullying on Traumatized Workers*, 16 EMP. RESP. & RTS. J. 118 (2004).

181. The national courts play an important role by the interpretation of the notion of harassment. "All sorts of conduct may amount to harassment. . . . A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour." *Majrowski v. Guy's and St Thomas' NHS Trust*, [2006] I.C.R. 1218, HL (U.K.).

182. Under the French Code moral harassment means the "deterioration of the working conditions which may affect the rights and dignity of the employee, alter (his) mental or physical health or threaten (his) professional future." 1 Conclusions 2003, at 204 (Fr.).

183. *Id.* at 130; Gina Vega & Debra R. Comer, *Bullying and Harassment in the Workplace*, in *MANAGING ORGANIZATIONAL DEVIANCE* 193–94 (Roland E. Kidwell & Christopher L. Martin eds., 2005); Ståle Einarsen & Eva Gemzoe Mikkelsen, *Individual Effects of Exposure to Bullying at Work*, in *BULLYING AND EMOTIONAL ABUSE IN THE WORKPLACE: INTERNATIONAL PERSPECTIVES IN RESEARCH AND PRACTICE* 127, 128–36 (Ståle Einarsen et al. eds., 2003).

The conduct of employers, coworkers, and third parties can cause moral harassment.¹⁸⁴ The Committee did not analyze the cases in which the conduct of the perpetrator could be connected to the work of the workers or directly affect the working environment. The proximity between the harassing behavior and the work performed by the worker can be assessed on a case by case basis.

E. Forms of Victimizing Conduct

Forms of victimizing conduct may include a wide range of behaviors.¹⁸⁵ It is not easy meticulously to describe the types of violence at work.¹⁸⁶

Moral harassment can affect a person's mental and physical well-being. Protection of workers against harassment may be achieved in a number of ways.¹⁸⁷ The extent of the protection against moral harassment has not been clarified as regards other rights enshrined in the Revised Charter. Moral harassment has not been examined within the scope of Articles 2, 3, 11, and 20 of the Revised Charter.¹⁸⁸

We can conclude that the occupations and branches presenting a major risk for the integrity of workers have not been identified. Particularly vulnerable groups of workers have not been categorized.

F. Examples on the Harm of Dignity of the Worker in the National Jurisdiction

The actions that can violate the workers' dignity have not been pursued in the case law of the Committee. There are many ways in which an employer, coworker, or third party can inflict harm on the dignity of the worker. Furthermore, we demonstrate some cases that could be valuable assessing the conformity of states reports with the Revised Charter.

The harm of dignity on the basis of moral harassment is widely publicized issue. The violation of dignity of the worker was found in *Société Mât de misaine c/Pouvreau* by the Social Affairs Chamber of

184. Jean-Pierre Brun & Evelyn Kedl, *Porter plainte pour harcèlement psychologique au travail: Un récit difficile* [Filing a Psychological Harassment Claim in the Workplace: A Difficult History], 61 RELATIONS INDUSTRIELLES/INDUSTRIAL RELATIONS 392 (2006).

185. HEINZ LEYMAN, *MOBBING* 21-34 (1993); HIRIGOYEN, *supra* note 179, at 41-50.

186. INT'L LAB. ORG., *DIGNITY AT THE WORKPLACE* 11 (1998); THE FOURTH INTERNATIONAL CONFERENCE ON BULLYING AND HARASSMENT IN THE WORKPLACE, BERGEN NORWAY, at (Såle Einarsen & Morten Birkeland Nielsen eds., 2004).

187. 1 Conclusions 2003, at 326 (It.).

188. See Conclusions XIII-5, 273-274 (Swed.).

the Court of Cassation.¹⁸⁹ The court stated: “The employee had been subjected to the removal of the employee’s mobile telephone for professional use without cause . . . to a new and unjustified obligation of having to attend the employee’s superior’s office every morning . . . and the employee had been assigned tasks with no bearing to the employee’s duties, acts causing a depressive condition medically ascertained, requiring sick leave.”¹⁹⁰ The conjunction and repetition of these acts constituted a moral harassment.¹⁹¹ In *Lambert c./Boursier* the violation of dignity was stated because the employer had sent the employee to a room without decent heating and without the necessary working utensils and told her coworkers not talk to her anymore.¹⁹² The impairment of working conditions of the employee violated her dignity, endangered her mental health, and threatened her professional future.

Two interesting cases can be mentioned concerning bullying at work in the United Kingdom. In *Green v. DB Group Services (UK) Ltd.*, the High Court found that the “domineering, disrespectful, dismissive, confrontatory” behavior of coworkers “which was designed to undermine and belittle” the worker “in the view of others” over considerable period of time amounted to bullying within the ordinary meaning of that term, as well as harassment under the Protection from Harassment Act.¹⁹³ The claimant had been subjected to a “relentless campaign of mean” with great frequency and “spiteful behaviour designed to cause her distress.” The behavior was oppressive and unreasonable. The employer was vicariously liable in negligence for acts of bullying resulting in psychiatric injury to an employee, and liable for harassment in respect of the same acts. The violation of dignity through abuse of power of coworkers and the employer was not analyzed.

189. Cass. soc., Oct. 27, 2004, Rev. Jurispr. Soc. 1/05 21, No. 2071 F-PB, Société Mât de misaine c/Pouvreau (Fr.).

190. See 24 Int'l Lab. L. Rep. 211 (containing translation of the case).

191. See Art.L.122-49 Code du Travail.

192. “Ayant constaté, par une appréciation souveraine des éléments de fait et de preuve qui lui étaient soumis, que l'employeur avait affecté le salarié dans un local exigü et sans outils de travail lors de sa reprise du travail, que ledit local était dépourvu d'un chauffage décent, que l'employeur avait également volontairement isolé l'intéressé des autres salariés de l'entreprise en leur demandant de ne plus lui parler, qu'il avait été encore jusqu'à mettre en doute son équilibre psychologique et avait eu un comportement excessivement autoritaire, une cour d'appel a pu en déduire que par leur conjonction et leur répétition ces faits constituaient un harcèlement moral.” Cass. soc., June 29, 2005, Rev. Jurispr. Soc. 10/05 681, no. 1490 F-D, Lambert c/Boursier (Fr.); see Cour d' Appel [CA] [regional court of appeal] d' Aix-en-Provence, Dec. 18, 2001, Droit Sociale 701, Gérard Alinot c/Société Crédit Commercial de France (Fr.). this case the court had cited the Article 26, paragraph 2 of the Revised Charter in the judgment.

193. *Green v. DB Group Services (UK) Ltd.*, [2006] I.R.L.R. 764 HC (QB).

In *Miles v. Gilbank and another* the Court of Appeal affirmed that the employer was liable for discriminatory acts against her pregnant employee in relation to “inhumane and sustained campaign of bullying and discrimination” through unsympathetic remarks towards the employee, ignorance, demoralization, undervaluation, and public reprimand of the employee.¹⁹⁴ The employer failed to conduct risk assessment and to make adjustment to working practices to accommodate the condition of the employee. The behavior on the part of the managers had gone beyond “malicious” and amounted to “downright vicious.” “It was targeted, deliberate, repeated and consciously inflicted. It not only demonstrated to the claimant a total lack of concern for the welfare of the claimant herself, but a callous disregard or concern for the life of her unborn child.”

In other cases, the harm of dignity goes beyond moral harassment. The Labour Court in Germany considered in the *Wal-Mart* decision whether the implementation of the code of conduct for employees of the international supermarket chain is contrary to the national law on the protection of dignity.¹⁹⁵ The ethical guidelines included restrictions on the behavior of workers at work and on their private life. They contained a clause reading as follows, “Employees may not go out or enter a love relationship with someone if this could influence the working conditions of the person involved.” This provision was held to violate the personality rights of the employees, particularly the human dignity and personal freedom guaranteed in Article 1, paragraph 1 (1) and Article 2, paragraph 1 of the Basic Law (Grundgesetz, the German Constitution). An employer has to respect these rights and cannot oblige workers to adhere to standards that ban private relationships in the workplace.¹⁹⁶

Further aspect of the violation of dignity of the worker was highlighted by the Supreme Court of Hungary. It found that both an employer-ordered security escort for a terminated employee and the

194. *Miles v. Gilbank and another*, [2006] I.C.R. 1303 CA.

195. Landesarbeitsgerichte [LAG] [Labor Court of Appeals], Nov. 11, 2005, 10 TaBV 46/05 (ArbG Wuppertal, June 15, 2005, 5 BV 20/05) (F.R.G.).

196. “Für die Würde des Menschen ist nicht allein entscheidend, dass und wie er seine Arbeit erbringt. Sein Selbstwertgefühl wird auch durch die Tatsache beeinflusst, ob und mit welchem Arbeitskollegen, welcher Arbeitskollegin er sich befreundet oder in eine Liebesbeziehung tritt. Neben der Arbeit stellt der Umgang mit den Arbeitskollegen für den Arbeitnehmer zugleich eine wesentliche Möglichkeit zur Entfaltung seiner geistigen und körperlichen Fähigkeiten und damit zur Entfaltung seiner Persönlichkeit dar. . . . Wird dem Arbeitnehmer diese Möglichkeit der Persönlichkeitsentfaltung im Rahmen seines Arbeitsverhältnisses genommen, so berührt dieses seine Würde als Mensch. Wenn dem Arbeitnehmer untersagt wird, in seinem Arbeitsverhältnis mit Kollegen oder Vorgesetzten (auch) in privaten Kontakt zu treten und eine persönliche Beziehung herzustellen, greift dieses Verbot tief in das Persönlichkeitsrecht des Mitarbeiters ein.” *See id.*

employee's public expulsion from his workplace contravene the provisions on the dignity.¹⁹⁷ Following the notice to the managing employee to terminate the contract given by the employer, he allowed the employee to move in the workplace only with a bodyguard, the removal of his personal things was heavily controlled, he had been seen to the door in public, and the employer commanded the porter to expel the employee. A document about the expulsion had been displayed, as well. These acts of the employer violated the personality rights and the dignity of the employee.

In regard to these cases, it appears that the moral harassment and violation of dignity are linked to the disrespectful or degrading treatment with serious effects on the employee. The gravity of the harm on dignity is examined in respect to the national traditions and moral principles.

G. Obligations of the Parties under Article 26, paragraph 2 of the Revised Charter

The nature of a state's obligations is similar to its duties relating to the protection against sexual harassment. Pursuant to Article 26, paragraph 2 of the Revised Charter the Contracting Parties undertake to promote awareness, information, and prevention of moral harassment and to take all appropriate measures to protect workers from such conduct.

The undertakings of states are interpreted in a similar fashion to the case of sexual harassment. The Committee has advanced the view that State Parties to the Revised Charter having accepted Article 26 paragraph 2 "shall ensure an adequate legal protection of employees against moral harassment 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."¹⁹⁸

The requirements of compliance with Article 26, paragraph 2 of the Revised Charter have not been comprehensively and firmly established. Nonconformity has only been stated in one case. A negative conclusion was reached on the Moldovan report because the national legislation did not provide protection against moral

197. Elvi Bírói Határozat 2000/359.

198. 2 Conclusions 2003, at 539 (Slovn.); 1 Conclusions 2005, at 393 (Lith.); 2 Conclusions 2005, at 496 (Mold.).

harassment. A lack of regulatory or administrative measures is contrary to the Revised Charter.¹⁹⁹

States have submitted incomplete information on moral harassment and in many cases it has proved an obstacle to reaching well-founded conclusions. Moral harassment is a complex subject to capture. This social issue cannot legally be reflected explicitly.

H. Toward Progress

In many of the European countries there are no specific laws relating to bullying at work. Provisions on harassment at work are gradually being enacted in legislation.²⁰⁰ Article 26, paragraph 2 of the Revised Charter is a valuable provision in tackling moral harassment at work and can accelerate the progress of legal development.

It is difficult to respond to the question of whether Article 26, paragraph 2 of the Revised Charter provides for a high standard of care of workers' physical and mental welfare. The definition of moral harassment is very broad in the sense of this article. It can embrace a wide range of "offensive actions" that violate dignity. We consider that by way of dynamic interpretation the scope of the protection of workers' dignity under Article 26, paragraph 2 of the Revised Charter could be widened. Attacks on the dignity of worker in the form of moral harassment have not been categorized in the case law. The Committee did not exhaustively comment on the concept of workers' dignity within the scope of Article 26, paragraph 2 of the Revised Charter. The various spheres of the protection against victimizing conduct have not been elucidated. The privacy and the private life of workers have not been appraised. The boundaries of the implementation of this article are uncertain.

VII. CONCLUSION

Article 26 of the Revised Charter marks a significant step forward concerning the protection of the immaterial interests of workers in the international human rights system in Europe and gives impetus to enhancing respect for the integrity of workers and the improvement of their working conditions. The characterization of the right to dignity is closely linked to changes in the working

199. 2 Conclusions 2005, at 496 (Mold.).

200. EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, VIOLENCE, BULLYING AND HARASSMENT IN THE WORKPLACE 18 (2006), available at <http://www.eurofound.eu.int>; European Parliament Resolution on Harassment in the Workplace, Eur. Parl. Doc. C 77 E/138 (2002).

environment. The composition of the right to dignity at work marks a new direction in the protection of workers' rights.

Analysis of Article 26 reveals that the concept of dignity in the Revised Charter is narrow. The influence of this article on the development of law and policy in Europe can be assessed askance. There is concern about the extent of the protection of dignity. The value of dignity is more far-reaching than interests relating to sexual harassment and victimization. Under Article 26 of the Revised Charter sexual and moral harassment are given a broad definition. However, the Committee has not felt able to develop the autonomous concept of dignity at work. Common standards on the protection of dignity have not been detailed in the assessment of the conformity of states' reports. The forms of the violation of dignity have not been elucidated.

Effective implementation of the right to dignity is considerably influenced by the nature of the undertakings. The obligations emanating from the Article 26 of the Revised Charter have not been defined unequivocally.

The concept of the dignity of the worker is elusive, depending on cultural, moral, and contextual considerations.²⁰¹ The question of dignity is interwoven with ethical issues.²⁰² In implementing the right to dignity at work, the legal, economic, cultural, and ethical principles interact; cultural traditions in particular are dominant regarding the advancement of dignity. The right to dignity at work demands social changes "to realize the underlying moral vision of human nature."²⁰³

We can assert that the right to dignity is in need of development through dynamic interpretation in the supervision of compliance or by inserting a new provision in the Revised Charter. Protection of the development of the personality of the worker could be realized on the ground of an exact provision covering, for instance, the privacy of workers, the freedom of expression at work.

The realization of a coherent concept concerning the protection of immaterial interests of workers depends on many factors.²⁰⁴ The

201. James Q. Whitman, "Human Dignity" in *Europe and in the United States: The Social Foundations*, 25 HUM. RTS. L.J. 23 (2004); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151 (2004); Matthew Finkin, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 COMP. LAB. L. & POL'Y J. 577, 590-609 (2002); Jean-Michel Servais, *Universal Labour Standards and National Cultures*, 26 COMP. LAB. L. & POL'Y J. 41 (2004); JOHN W. BUDD, EMPLOYMENT WITH A HUMAN FACE, BALANCING EFFICIENCY, EQUITY AND VOICE 20 (2004).

202. Rex D. Glensy, *Quasi-Global Social Norms*, 38 CONN. L. REV. 92 (2005).

203. DONNELLY, *supra* note 3, at 15.

204. Christian v. Bar, *Gemeineuropäisches Deliktsrecht Band II*, at 60 (1999).

legal interpretation of the dignity of the worker is contested in the national legal systems.²⁰⁵ It is not clear what is meant by dignity in the legal sense. Several criteria are at work in influencing its interpretation.

To improve the concept of the dignity of workers, many sources can be taken into account. International labor standards provide a general framework for the protection of dignity. The sociological approach focuses on specified issues that are mostly regulated by law. The tradition of constitutional jurisprudence is of great impact on the meaning of workers' dignity.²⁰⁶ In our view the various national experiences can be instrumental in developing the protection of dignity and initiatives in European Community law could also facilitate this process.

205. PHILIPPE WAQUET, L'ENTREPRISE ET LES LIBERTÉS DU SALARIÉS 162 (2003); CHARLOTTE GIRARD & STÉPHANIE HENNETTE-VAUCHEZ, LA DIGNITÉ DE LA PERSONNE HUMAINE RECHERCHE SUR UN PROCESSUS DE JURIDICISATION 72 (2005); Olivier de Tissot, *Pour une analyse juridique du concept de "dignité" du salarié*, DROIT SOCIAL 972 (1995).

206. BERNHARD KRAUSHAAR & MARTIN KRAUSHAAR, DIE GRUNDRECHTE IN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS UND IHR EINFLUSS AUF DIE ENTWICKLUNG DES INDIVIDUELLEN ARBEITSRECHTS 69 (2003); PATRICE ADAM, L'INDIVIDUALISATION DU DROIT DU TRAVAIL 46-51 (2005); VALÉRIE OGIER-BERNAUD, LES DROITS CONSTITUTIONNELS DES TRAVAILLEURS 243 (2003); ISABELLE MEYRAT, DROITS FONDAMENTAUX ET DROIT DU TRAVAIL 211 (1998); GÉRARD LYON-CAEN, LES LIBERTÉS PUBLIQUES ET L'EMPLOI 152-69 (1990).