
UCL

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Work Forum on the Implementation of the
UN Convention on the Rights of Persons
with Disabilities



**The European Social Charter as a tool for
the protection of the rights of persons
with disabilities, with an emphasis on
inclusive education**

Outline

- **The European Social Charter as a channel for the implementation of the UN Convention on the Rights of Persons with Disabilities**
- **The status of the European Social Charter in EU law**
- **The costs of non-cooperation : the risk of conflicts**
- **How to strengthen the status of the European Social Charter in EU law**

The System of the European Social Charter



The System of the European Social Charter



The “social conception” of disability

- **Article 15 –The right of persons with disabilities to independence, social integration and participation in the life of the community**

- With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the **effective exercise of the right to independence, social integration and participation in the life of the community**, the Parties undertake, in particular:
 - 1. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training **in the framework of general schemes wherever possible** or, where this is not possible, through specialised bodies, public or private;
 - 2. to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities **in the ordinary working environment and to adjust the working conditions to the needs of the disabled** or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services; ...

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 - ...
 - 3. to promote their **full social integration and participation in the life of the community** in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

The “social conception” of disability

DECISION SUR LE BIEN-FONDE

Adoption : 4 novembre 2003

Notification : 7 novembre 2003

Publicité : 8 mars 2004

RECLAMATION N° 13/2002

**Par Autisme - Europe
contre la France**

Article E – Non-discrimination

La jouissance des droits reconnus dans la présente Charte doit être assurée sans distinction aucune fondée notamment sur la race, la couleur, le sexe, la langue, la religion, les opinions politiques ou toutes autres opinions, l'ascendance nationale ou l'origine sociale, la santé, l'appartenance à une minorité nationale, la naissance ou toute autre situation ».

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48. Ainsi qu'il l'a souligné dans l'Introduction générale aux Conclusions 2003 (p. 10), le Comité estime en effet que l'article 15 de la Charte révisée marque un tournant dans l'évolution du système de valeurs que l'on a vu se dessiner dans tous les pays européens depuis une dizaine d'années, le traitement des personnes handicapées comme un groupe cible particulier ayant cédé la place à une approche soucieuse de les respecter comme des citoyens à part entière - une approche que le Conseil de l'Europe a contribué à promouvoir avec l'adoption par le Comité des Ministres de la Recommandation (92) 6 de 1992 sur une politique cohérente pour les personnes handicapées. L'idée sous-jacente à l'article 15 est que les personnes handicapées doivent jouir pleinement de la citoyenneté et que leurs droits essentiels sont, à ce titre, « l'autonomie, l'intégration sociale et la participation à la vie de la communauté ». Garantir un droit à l'éducation des enfants et autres personnes atteintes d'un handicap est d'évidence une condition pour atteindre cet objectif. Ceci explique pourquoi l'éducation est désormais spécifiquement mentionnée à l'article 15 de la Charte révisée et pourquoi le texte insiste tant sur la nécessité de faire en sorte que cette éducation se déroule « dans le cadre du droit commun chaque fois que possible ». Il convient de rappeler que l'article 15 s'applique à toutes les personnes

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En d'autres termes, il faut non seulement, dans une société démocratique, percevoir la diversité humaine de manière positive, mais aussi réagir de façon appropriée afin de garantir une égalité réelle et efficace.

A ce titre, le Comité considère que l'article E interdit non seulement la discrimination directe, mais aussi toutes les formes de discrimination indirecte, que peuvent révéler soit les traitements inappropriés de certaines situations, soit l'inégal accès des personnes placées dans ces situations et des autres citoyens aux divers avantages collectifs.

53. Le Comité rappelle, comme il l'a déjà affirmé dans sa décision relative à la réclamation n° 1/1998 (Commission Internationale de Juristes c. Portugal, § 32), que pour l'application de la Charte, l'obligation incombant aux Etats parties est de prendre non seulement des initiatives juridiques mais encore des initiatives concrètes propres à permettre le plein exercice des droits reconnus par la Charte. Lorsque la réalisation de l'un des droits en question est exceptionnellement complexe et particulièrement onéreuse, l'Etat partie doit s'efforcer d'atteindre les objectifs de la Charte à une échéance raisonnable, au prix de progrès mesurables, en utilisant au mieux les ressources qu'il peut mobiliser. Les Etats parties doivent en outre être particulièrement attentifs à l'impact des choix opérés par eux sur les groupes dont la vulnérabilité est la plus grande ainsi que sur les autres personnes concernées, tout particulièrement les familles sur qui, en cas de carence institutionnelle, pèse un écrasant fardeau.

L'exemple de l'affaire FIDH et Inclusion Europe c. Belgique

- **Réclamation n° 141/2017: Fédération internationale des Ligues des Droits de l'Homme (FIDH) et Inclusion Europe c. la Belgique**
- **Argument:** en ne déployant pas des efforts suffisants pour favoriser l'inclusion des enfants ayant un handicap mental dans l'enseignement ordinaire de niveaux primaire et secondaire dispensé dans les établissements dépendant de la Communauté française (Fédération Wallonie-Bruxelles), la Belgique ne se conforme pas aux obligations qui découlent de l'article E de la Charte sociale européenne (non-discrimination), combiné aux articles 15 (droit des personnes handicapées à l'autonomie, à l'intégration sociale et à la participation à la vie de la communauté) et 17 (droit des enfants à la protection sociale, juridique et économique) de la Charte sociale européenne révisée.

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The reference to the ESC in the EU Treaties...

- **Original understanding of the role of the ESC in the establishment of the common market (1956-1957)**
- **Reference to the ESC in Art. 151 TFEU (ex Art. 136 EC Treaty – and Preamble to the SEA):** ‘The Union and the Member States, **having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961** and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.’

... but the ESC is not granted status equivalent to that of the ECHR

- The Court of Justice of the European Union does not consider the ESC as “de facto” binding on the EU, as is the ECHR – although it could provide a source of inspiration for the development of fundamental rights in the EU
- The ESC has been ratified by all EU Member States, although 8 States still have not ratified the Revised ESC (1996) and the “à la carte” system of the ESC leads the commitments to be uneven across the States
- The marginalization of the ESC in the adoption of the Community Charter of Fundamental Social Rights of Workers (1989) and in the negotiation of the EU Charter of Fundamental Rights (1999-2000)

The Charter of Fundamental Rights: a selective approach towards the ESC

- Social provisions “insofar as they do not merely establish objectives for action by the Union” (Cologne European Council, 3-4 June 1999)
- The Charter of Fundamental Rights omits some rights of the ESC, e.g., the right to work (Art. 1 ESC) (although “full employment” is part of the objectives of the Union and “promotion of a high level of employment” is mainstreamed under Art. 9 TFEU) and the right to a fair remuneration (Art. 4 ESC)
- “Principles” (as opposed to “rights”) have a limited justiciability under Article 52(5) of the Charter of Fundamental Rights
- No explicit link established with the interpretation of the ECSR (comp. Art. 52(3) of the Charter for the ECtHR)

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The costs of non-cooperation: the risk of conflicts

- **European Court of Human Rights (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005 (Appl. No. 45036/98)**, establishing a presumption of compatibility with the requirements of the ECHR of measures adopted by EU Member States by which they implement the requirements of EU law: action “taken in compliance with such legal obligations is justified as long as the relevant organization [set up by a treaty subsequent to the ECHR] is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (...). By ‘equivalent’ the Court means ‘comparable’: any requirement that the organization’s protection be ‘identical’ could run counter to the interest of international co-operation pursued” (par. 155).

The costs of non-cooperation: the risk of conflicts

- The presumption of compatibility with the international human rights obligations of EU Member States does not extend to human rights guarantees that are not protected in the EU legal order in a way that may be considered “equivalent” to that which applies to the EU Member States
- **European Committee of Social Rights, *Confédération générale du travail (CGT) v. France*, Complaint No. 55/2009, decision on the merits of 23 June 2010, para. 35:** 'neither the situation of social rights in the European Union legal order nor the process of elaboration of secondary legislation would justify a similar presumption – even rebuttable – of conformity of legal texts of the European Union with the European Social Charter' (domestic legislation complying with the 2003 Working Time Directive may nevertheless be inconsistent with the ESC's requirements).

The costs of non-cooperation: the risk of conflicts

- The implementation in Swedish legislation of the Laval judgment (Case C-341/05, *Laval un Partneri Ltd.*, judgment of 18 Dec. 2007) : see European Committee on Social Rights, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012, decision (admissibility and merits) of 3 July 2013
- Restrictions to the conclusion of collective agreements not in conformity with Article 6 para. 2 of the European Social Charter (duty to promote collective bargaining), and right to collective action cannot be limited to what 'is necessary to obtain given minimum working standards' without violating Art. 6 para. 4 of the ESC (right of workers and employers to resort to collective action)

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How to improve the status of the European Social Charter in the EU?

- 1. (Commission, Council, Parliament) Rely on other international human rights instruments in interpreting the EU Charter of Fundamental Rights
- 2. (Court of Justice, Commission, Council, Parliament) Reading the Charter of Fundamental Rights in line with the ESC and the case-law of the ECSR, which is 'particularly qualified' to provide an authoritative interpretation (Eur. Ct. HR (2nd sect.), *Tüm Haber Sen and Çınar v. Turkey* (Appl. no. 28602/95) judgment of 21 Feb. 2006) – and include the rights of the ESC among the general principles of EU law which the CJEU ensures respect for (Art. 6(3) TEU).
- 3. (Commission, Council, Parliament) Include explicit references to the European Social Charter and other international human rights instruments that all the EU Member States have ratified in the guidelines for impact assessments of legislative proposals.

How to improve the status of the European Social Charter in the EU?

- 4. (Commission and Council) Defining a common approach towards the ESC: EU Member States could 'harmonise their commitments, ... by all ratifying the revised Charter and all accepting all the provisions in the Charter which are most directly related in terms of substance to the provisions of EU law and the competences of the EU ... It would be useful for a definition of a kind of 'Community core' within the Charter to be drawn up so as to give EU member states clear indications in this respect' (European Committee of Social Rights, contribution to the Turin process, July 2014).
- 5. (Commission and Council) Launching the process for the accession of the European Union to the European Social Charter