



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 18 May 2005

GT-DH-SOC(2005)007

**STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)**

**WORKING GROUP ON SOCIAL RIGHTS
(GT-DH-SOC)**

REPORT

**3rd meeting
Strasbourg, 30 March – 1st April 2005**

Introduction

1. The Working Group on Social Rights (GT-DH-SOC) held its 3rd meeting in Strasbourg, from 30 March to 1st April 2005. The meeting was chaired by Mrs Deniz AKÇAY (Turkey). The list of participants appears in Appendix I. The agenda, as it was adopted, is reflected in Appendix II.

2. As requested by the CDDH in November 2004, the meeting was primarily devoted to drawing up an activity report (GT-DH-SOC(2005)006). The CDDH will discuss this report in June 2005 with a view to deciding whether to pursue work in this area.

Item 1: Opening of the meeting and adoption of the agenda

3. By way of introduction, the Chair reminded members that the Group's main task at this meeting was to draw up an activity report that would give the CDDH sufficient information to enable it to decide in June 2005, (i) whether the Council of Europe was the right place to pursue this exercise, bearing in mind that other international bodies were also interested in the development of social rights, and (ii) what resources were needed if investigation of the various questions was to be taken further.

4. In this context she recalled that it would be useful for the CDDH to have an initial overview of what would, in legal terms, be feasible or not to feature in a possible protocol introducing some social rights in the framework of the Convention. This was intended as an exploratory exercise designed to enable the CDDH to take fully informed decisions in June. The Group was thus invited to discuss very freely a possible list of social rights that could be considered justiciable under the Convention, without at this stage embarking on an analysis of the political advisability of such a protocol – an issue that did not lie directly within the Group's remit. The brainstorming that the Group was invited to hold at this meeting should not, therefore, be understood as any kind of attempt to draw up a draft protocol, but as an effort to identify substantive elements to include in the activity report for the CDDH.

Item 2: Exchange of views on the possible justiciability of certain social rights in the framework of the ECHR

5. The starting point for the discussion of the possible justiciability of certain social rights under the Convention was provided by document GT-DH-SOC(2005)005, which reproduced the list of rights set out in Appendix III to the Group's previous meeting report (GT-DH-SOC(2004)003). In order to organise the discussion around actual texts, the Secretariat had presented draft wordings for several of those rights in this document.¹

¹ The list of rights as well as the wordings at issue are reproduced in Appendix III to this report.

In the second part of the document, for reference purposes, the Secretariat had reproduced the wordings occurring in various international instruments.

6. The Group considered that the list supplied in document GT-DH-SOC(2005)005 and reproduced in Appendix III to this report was a good basis to work on. Before discussing the individual wordings, it held a general exchange of views.

Justiciability under the Convention

7. The Group confirmed the parameters for justiciability that it had indicated at its first meeting: in order to be justiciable under the Convention, a social right must have the same characteristics as those rights already protected under the Convention, that is, it must be fundamental, universal and formulated sufficiently precisely (as a subjective right conferred directly on individuals) to give rise to legal obligations.

8. Some experts reiterated their reservations in principle about including such rights in the Convention and said that before going any further, it would be necessary to ascertain to what extent social rights were already justiciable in the different member States. They felt that it was necessary to demonstrate that additional benefit would result from including certain social rights within the ECHR. Protection is already provided by other mechanisms, including, within the Council of Europe, the European Social Charter (ESC) and the Revised European Social Charter (ESCrev). Concern was also expressed that including these rights in the ECHR would provide the individual with a right against the state but not against private individuals or bodies, such as employers, against whom the right may need to be enforced. They also expressed their fears as to the capacity of the Court, which was currently overwhelmed with applications, to cope with the volume of proceedings (which would be lengthy and highly complex, especially in view of the diversity of national legislation on social matters) that a possible protocol would undoubtedly produce in the future.

9. Other experts considered that, on the other hand, the aim of one day achieving the justiciability of social rights under the Convention was the logical consequence of the indivisibility of human rights. It was pointed out that the Court currently received very large numbers of applications concerning social rights, which most often led to decisions of inadmissibility. It would be useful to consider ways in which these inadmissible applications, when they raise issues of principle, could be reoriented, for instance before the European Committee for Social Rights via the collective complaints mechanism provided for by the ESCrev.

10. In any event, some experts felt that it would be useful for the CDDH to discuss the advisability of holding a hearing, at an appropriate stage, on the national and international justiciability of these rights.

11. A discussion was also held on a possible hierarchy of social rights, which would point up a “hard core” from which no derogations were possible. In that respect, it was

acknowledged by several experts that some rights in the ECHR are non-derogable, that some are absolute and that others are qualified. The conclusion reached was that while there may not be a hierarchy as such, this did not prevent a distinction being drawn and the various social rights being safeguarded in different ways. In this context, some experts also noted that the European Union Charter of Fundamental Rights had drawn a distinction between rights and principles.

Impact of the entry into force of Protocol No 12 to the ECHR

12. Several experts mentioned the impact that the entry into force of Protocol No 12 to the Convention would have on the protection of social rights. They wondered in this connection about the added value of a possible protocol containing social rights. Other experts noted that, with the entry into force of Protocol No 12, the Court would examine some aspects of social rights, but only from the point of view of possible discrimination in the enjoyment of those rights.

Exchange of views on the basis of the wordings of social rights (document GT-DH-SOC(2005)005)²

General framework of the discussion

13. The aim of the discussion was to consider the possibility and the interest of justiciability of some social rights, or of certain aspects of these rights, as well as to consider which rights, and under which conditions, these rights could be considered justiciable. It was to provide the CDDH with a starting point from which it may take an informed decision as to whether it is advisable to continue discussions in this area. The discussion was not aimed at drafting articles for possible inclusion in a draft protocol.

14. In this context, the Group thanked the delegations that had submitted written comments on the list of rights.³ The comments were borne in mind during the discussions. It was recalled that the wordings prepared by the Secretariat were designed to facilitate discussions to establish whether the rights on the list may be justiciable, to what extent and under what conditions. The experts who had voiced doubts about the international justiciability of social rights wished to express their unease over the examination of specific wordings.

General considerations

15. The experts agreed as to the difficulty of formulating rights containing clear and well-defined obligations, to which States might subscribe without fear of heavy financial consequences resulting from judgements of the Court. It was also noted that the rights listed in document GT-DH-SOC(2005)005 were very heterogeneous in substantive terms and varied in the extent to which they could be formulated so as to give rise to subjective

² These wordings, as well as the list of rights, are reproduced in Appendix III to this report.

³ See document GT-DH-SOC(2005)008.

rights. The complexity of the right to work was cited as an example to demonstrate that some aspects of this right were more suited to being justiciable than others. Consequently, when considering any option of possibly including a new right in the ECHR, it was essential to take account of this heterogeneity and therefore formulate the right in question sufficiently precisely to give rise to subjective rights directly conferred on individuals.

16. Reference was also made to the discussions in progress at the United Nations on the triple obligation to “respect, protect and fulfil” rights and the difficulties that this raised in terms of the behaviour expected of states in order to be able to “respect, protect and fulfil” social rights. It was pointed out that the obligation to “respect” would require states to refrain from certain practices, the obligation to “protect” would require them to take steps to avoid any interference by third parties in the enjoyment of the right in question and the obligation to “fulfil” would require them to make active efforts to give effect to the right in question. It was emphasised that it was easier to recognise the justiciability of the obligation to respect and protect a social right or an aspect of that right, while reservations remained as to the justiciability of the obligation to fulfil.

Scope of personal application

17. Many experts considered that the very important question of the delimitation of the personal scope of application of the social rights to be possibly inserted in the framework of the ECHR and its consequences for State parties to the ECHR, should be deepened. It was highlighted that the spirit of the ECHR is to grant rights to “everyone” and that this might result unrealistic in the area of social rights.

Positive or negative wording of rights

18. It was noted that the Secretariat had sometimes proposed a “positive” wording (everyone has the right...) or a “negative” wording (no one shall...) for the same right. Several experts stressed their preference for the positive wording, pointing out that it would be better suited to any new rights that might be added to the ECHR. Others also emphasised that where social rights were concerned, the negative wording would reduce the added value of including certain rights in the ECHR because they might already be implicitly protected by the ECHR (the right to housing was cited as an example: it could implicitly be recognised by the Court when examining Article 8 and Article 1 of Protocol No 1 to the ECHR). Other experts nevertheless pointed out that the negative wording was not to be underestimated because it would be more easily justiciable, more acceptable to member States and its added value by comparison with the present situation was that it would guarantee direct protection for the individual. It was also observed that both wordings could have economic implications for states because both might imply positive obligations for them. The Group therefore concluded that the choice of wording would have to be made on a case-by-case basis.

Reference to human dignity

19. Most members of the Group agreed that any new rights that might be included in a protocol to the ECHR containing social rights should have human dignity as a common denominator. A majority of members were also of the opinion that a reference to respect for human dignity could appear in the preamble to such a protocol or in one of its recitals. It was not thought advisable to enshrine respect for this fundamental principle in an article of the possible protocol. Some experts stressed that it might nevertheless be useful to refer to respect for human dignity in certain articles establishing new rights when that requirement may constitute a criterion for assessing whether or not the right in question was respected, protected and /or fulfilled (for example in the case of the right to the satisfaction of basic material needs).

Grouping rights by theme

20. To facilitate the discussions, it was suggested that the rights be analysed by broad themes (dealing with all the rights relating to the “right to work” by broad categories of rights, *i.e.* the right to work as such, collective rights, working conditions) and that the examination of rights start with the one recognised in Recommendation (2000)3 of the Committee of Ministers to member States, namely the right to the satisfaction of basic material needs. On this point, attention was drawn to the contribution made by ATD Fourth World. It was also observed that attention should be paid to the right of access to justice, including the right to be informed (the very poor are very often unaware of their rights).

Right to the satisfaction of basic material needs / right to protection from poverty

21. The Group took note of the criticisms made by ATD Fourth World and decided that it was preferable not to refer to a particular category of persons. If this right were chosen for a possible protocol, it should be worded with a view to being applicable to “everyone”.

22. To facilitate the discussions, the Secretariat proposed the following wording:

“Everyone has the right to the satisfaction of basic material needs, particularly food, clothing, shelter and basic medical care”.

23. While recognising that this wording was less ambitious than that of Article 30 ESCrev, several experts were of the opinion that it would lend itself better to supervision by the Court. These experts, however, considered that a possible protocol should not confine itself to this right alone.

24. Some experts were, nevertheless, of the opinion that this wording was too imprecise to give rise to enforceable obligations. These experts expressed, in any case, reservations regarding the extent of the obligations (the financial consequences of a very

wide scope of application) which could result from this description, as well as the unlikelihood that States would accept the right as justiciable, bearing in mind national practices.

Effective access to the law and to justice: the right to information on existing remedies, the content of rights and the available means of assistance

25. Some experts stressed the importance of granting access to information on existing remedies to uphold one's own social rights, on the content of those rights and on the available means of assistance. This would be a best-efforts obligation for the state, not an absolute obligation.

26. In this context some experts were in favour of enshrining a right to legal aid, (provided by a lawyer) preceded by a social assistance which would provide advice before engaging in judicial proceedings. Others considered that a provision of the kind would be superfluous since legal assistance was already covered by Article 6 ECHR. Concerns were also expressed by some experts given the potential financial implications of recognising such a right.

27. If the proposal to include a right of effective access to the law and to justice in the ECHR were to be taken up in the future, Committee of Ministers Recommendation (1993)1 on effective access to the law and to justice for the very poor could be viewed as a starting point.

Right to housing

28. If a negative wording of this right were to be adopted, it was suggested by some experts of the Group that it might be modelled on the following wording:

“No one shall be deprived of or evicted from his housing [arbitrarily / without a reason established by law and] without a social welfare service first being informed”.

29. It was pointed out that the added value of such a wording, by comparison with the protection of this right that may currently be afforded by the combined effect of Article 8 ECHR and Article 1 of Protocol 1 to the ECHR, was the requirement that before anyone could be deprived of or evicted from their housing, a social welfare service must be informed so as to reduce the risk that the persons concerned would be left on the streets from one day to the next.

30. Several experts nevertheless expressed their preference for a positive wording if the right to housing were one day to be included in the ECHR system. They admitted that drafting such a wording would be more complex, but said it would be worth attempting.

31. In this context, a few experts voiced concerns about the possible scope of the right to housing, especially as regards the effects it might produce, for which States could not

be held responsible. It was acknowledged that in many cases an effective remedy would require action against private persons, such as landlords, as opposed to the State.

Right to social security / Right to health / Right to social and medical assistance

32. Some experts wondered about the added value of possibly including these rights in the ECHR system since they were already covered by provisions of the European Social Charter and of other specific international instruments (including those of the Council of Europe). Others reiterated that the added value would be the possibility of filing individual applications on these rights with the Court.

33. Several experts suggested that if these rights were to be included in the ECHR system in the future, it would be preferable for them to be covered by three separate articles: (i) right to social security, (ii) right to health, and (iii) right to social and medical assistance. Some pointed out that this last right could be encompassed into the right to the satisfaction of basic material needs if the latter were to be taken up.

34. Some experts noted that the right to health should cover more than mere medical assistance. By way of example, it was observed that this right could include the right to a healthy environment. Other experts however were of the view that it would be better to formulate the “right to health” as a ‘right to access to health care’ or alternatively a “right to health care” as health itself can never be guaranteed, not even with the best of health care.

Right to education

35. *“Everyone has the right to education. This right includes the possibility of receiving free compulsory education.”*

This wording, which was suggested by the Secretariat, was accepted as a good working basis for a possible pursuit of the discussion if such a right were one day to be included in the ECHR system. Several experts nonetheless wondered about the scope of this right and observed that national situations differed with regard to periods of compulsory education. It was noted, in any event, that Article 2 of Protocol 1 to the ECHR already provides some protection in this area.

Right to work

36. While recognising that the “right to work” was a fundamental right, most experts expressed unease about the justiciability of this right not only under the ECHR system but in general. It was suggested that a study of the extent to which this right was justiciable at national level would be very useful as a prelude to further discussion on the possibility of rendering it justiciable within the framework of the ECHR. In that regard it was acknowledged that many aspects of this right are enshrined in detailed domestic and European legislation.

37. In view of the complexity of the rights connected with the right to work, it was suggested that rights 9 to 20 in the list of document GT-DH-SOC(2005)005 be considered in three broad categories: (i) “the right to work”; (ii) “the right to fair and just working conditions” and (iii) “collective rights” (to collective bargaining, information and consultation of workers), and thus draft different wordings.

38. Alternatively, it was suggested by some experts that an attempt be made to combine all these aspects in a single wording, as follows:

“Any person has the right, in compliance with the conditions governing permission for access to employment, to pursue a freely chosen and accepted occupation and to work in conditions that include respect for his health, safety, dignity [and capabilities], fair remuneration, protection against unfair dismissal and the right to organise.”

or:

“Any person has the right, in compliance with the conditions governing permission for access to employment:

- a) to access a freely chosen or accepted occupation*
- b) and to work in decent conditions that notably include respect for health, safety, dignity [and capabilities], fair remuneration, protection against unfair dismissal and the right to organise and to be regularly informed and consulted on the evolution and projects of the undertaking or one’s group.”*

However, due to lack of time, this proposal was not discussed in any detail.

Item 3: Adoption of the activity report

39. On the basis of a draft text submitted by the Secretariat, the Group drew up its activity report, which appears in document GT-DH-SOC(2005)006.

40. In submitting the report to the CDDH for discussion at its meeting in June 2005, the GT-DH-SOC considered that it had completed the terms of reference given to it by the Steering Committee.

Item 4: Other business

41. At the close of their discussions, the members of the GT-DH-SOC warmly thanked their Chair, Ms Deniz AKÇAY (Turkey) for the exemplary manner in which she had led the Group’s work.

Appendix I**List of participants / Liste des participants****BELGIUM / BELGIQUE**

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Apologised / Excusé

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* * *

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PARLIAMENTARY ASSEMBLY / ASSEMBLEE PARLEMENTAIRE

Apologised / Excusé

EUROPEAN COMMITTEE FOR SOCIAL COHESION / COMITE EUROPEEN POUR LA COHESION SOCIALE

M. François VANDAMME, Conseiller Général, Division des Affaires Internationales, service public fédéral « Emploi, Travail et Concertation sociale », rue Blérot, 1, B-1070 BRUXELLES

Other guests / Autre invités**EUROPEAN TRADE UNION CONFEDERATION (ETUC)**

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Mme Severina SPASSOVA, Lawyer / Juriste

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Secretariat of the European Social Charter / Secrétariat de la Charte sociale européenne

M. Régis BRILLAT, Executive Secretary / Secrétaire exécutif

* * *

Interpreters/Interprètes

Mme Sylvie BOUX

Mme Martine CARALY

Mme Nadine KIEFFER

Appendix II**Agenda****Item 1: Opening of the meeting and adoption of the agenda***Working document*

- Draft agenda GT-DH-SOC(2005)OJ001

Item 2: Exchange of views on the possible justiciability of certain social rights in the framework of the ECHR*Working documents*

- Wordings to facilitate discussions on the possible justiciability of social rights within the framework of the ECHR GT-DH-SOC(2005)005
- Report of the 2nd meeting of the GT-DH-SOC (4-5 November 2004) GT-DH-SOC(2004)003
- Up-dated overview of the case-law of the Court in social matters GT-DH-SOC(2005)001
- Up-dated information gathered by the Secretariat on the issue of justiciability of social rights within the United Nations, the Council of Europe and the European Union GT-DH-SOC(2005)002
- Document prepared by the Secretariat of the European Social Charter GT-DH-SOC(2005)003
- Execution of the European Court of Human Rights' judgments concerning social rights GT-DH-SOC(2005)004
- Contribution of the International Movement ATD Fourth World GT-DH-SOC(2004)002
- Fundamental Social Rights in Europe (study of the European Parliament)

Item 3: Adoption of a draft activity report*Working documents*

- Draft Activity Report for the intention of the CDDH GT-DH-SOC(2005)006

Point 4: Other business

Appendix III**List of rights and wordings suggested by the Secretariat to facilitate discussions
(from document GT-DH-SOC(2005)005)**LIST OF RIGHTS

- | | |
|---|--|
| 1. Right to the satisfaction of basic material needs (food, clothing, shelter and basic medical care) / right to an adequate standard of living | Recommendation R(2000) 3 of the Committee of Ministers / UDHR (art. 25), ICESCR (art. 11), ESC and ESC rev (art. 13), CFR (art. 34), |
| 2. The right to freedom from hunger | ICESCR (art.11) |
| 3. The right to housing | UDHR (art. 25), ESC rev (art. 31) |
| 4. The right to medical care and social services | UDHR (art. 25), ESC and ESC rev (art. 13), ICESCR (arts. 9 et 12), CFR (art. 35), ILO Medical Care and Sickness Benefits Convention (no 130) 1969 |
| 5. The right to protection from poverty and social exclusion | ESC rev (art. 30), CFR (art. 34) |
| 6. The right to social security | UDHR (art. 22), ESC and ESC rev (art. 12), ICESCR (art. 9), CFR (art. 34), ILO Sickness Insurance Conventions (no 24, 25) 1927, ILO Social Security (Minimum Standards) Convention (no 102) 1952, ILO Invalidity, Old-Age and Survivors' Benefits Convention (no 128) 1967 |
| 7. The right of the family to social, legal and economic protection | <i>UDHR (art. 16), ESC and ESC rev (art. 16), ICESCR (art. 10), CFR (art. 33), ILO Maternity Protection Conventions (no 103, 183) 1952, 2000, ILO Paid Educational Leave Convention (no 140) 1974, ILO Workers with Family Responsibilities Convention (no 156) 1981</i> |
| 8. The right to education | <i>UDHR (art. 26), ESC rev (art. 17), CFR (art. 14), ILO Social Policy (Basic Aims and Standards) Convention (no 117) 1962</i> |
| 9. The right to work | UDHR (art. 23), ESC and ESC rev (art. 1), ICESCR (art. 6), CFR (art. 15) |
| 10. The right to fair working conditions | <i>UDHR (art. 23), ICESCR (art. 7), ESC and ESC rev (art. 2), CFR (art. 31), ILO Hours of Work Conventions (no 1, 30) 1919, 1930</i> |
| 11. The right to safe and healthy working conditions | <i>ESC and ESC rev (art. 3), ICESCR (art. 7), ILO Hygiene Conventions (Commerce and Offices)</i> |

(no 120) 1964, ILO Working Environment (Air Pollution, Noise and Vibration) Convention (no 148) 1977, ILO Occupational Safety and Health Convention (no 155) 1981 and Protocol of 2002 to this Convention

12. The right to equal pay for equal work

ESC and ESC rev (art. 4), ICESCR (art. 7), ILO Equal Remuneration Convention (no 100) 1951

13. The right of collective bargaining

ESC and ESC rev (art. 6), ICESCR (art. 8), CFR (art. 28), ILO Right to Organise and Collective Bargaining Convention (no 98) 1949, ILO Collective Bargaining Convention (no 154) 1981

14. The right to vocational guidance and training

ESC and ESC rev (arts. 9 et 10), ICESCR (arts 6 et 13)

15. The right of workers to information and consultation within the undertaking

ESC rev (art. 21), CFR (art. 27)

16. Protection in the event of unjustified dismissal

ESC rev (art.24), CFR (art. 30), ILO Termination of Employment Convention (no 158) 1982

17. The right to protection against unemployment

UDHR (art. 23), ILO Employment Policy Convention (no 122) 1964, ILO Employment Promotion and Protection against Unemployment Convention (no 168) 1988

18. The right of access to a free placement service

ESC and ESC rev (art. 1), CFR (art. 29)

19. The right to holidays with pay

UDHR (art. 24), ESC and ESC rev (art. 2), CFR (art. 31), ILO Holidays with Pay Convention (no 52) 1936 and Holidays with Pay Convention (Revised) (no 132) 1970

20. The right to rest and leisure

UDHR (art. 24), ESC and ESC rev (art. 2), CFR (art. 31), ILO Weekly Rest (Commerce and Offices) Convention (no 106) 1957

WORDINGS SUGGESTED BY THE SECRETARIAT

Right to the satisfaction of basic material needs

Any person in conditions of extreme hardship has the right to adequate food, clothing, housing and medical care.

Or

No one shall be deprived of a standard of living respectful of human dignity.

Right to protection from poverty and social exclusion

Any person in conditions of extreme hardship has the right to be granted any assistance established by law to ensure that his/her standard of living is respectful of human dignity.

Right to housing

No one shall be deprived of housing without a reason established by law.

Right to social security, medical care and social services

No one shall be deprived without justification of the right to medical care and social assistance, in particular in the event of maternity, death of a spouse, old age, sickness, disability and unemployment.

Or

Any person [legally residing in a State] has a right to social security as well as medical care and social services as established by law.

Right to health

Everyone has the right of access to medical care according to the conditions established by law.

Or

No one shall be deprived of access to medical care under the conditions established by law.

Right to education

Everyone has the right to education. This right includes the possibility of receiving free compulsory education.

Right to work

Any person legally residing in a State has the right to work and to pursue a freely chosen or accepted occupation.

Right to fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.